

(26,240)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 773.

SOUTHERN PACIFIC COMPANY, PETITIONER,

vs.

HENRY L. BOGERT, TOWNSEND LAWRENCE, AND ANITA
LAWRENCE, AS EXECUTORS UNDER THE LAST WILL
AND TESTAMENT OF WALTER B. LAWRENCE, DE-
CEASED, &c., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

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Summons in State Court.

(Served July 28, 1913.)

New York Supreme Court

COUNTY OF QUEENS.

2

HENRY L. BOGERT, TOWNSEND
LAWRENCE and ANITA LAW-
RENCE, as executors under the
last will and testament of
Walter B. Lawrence, deceased,
suing on behalf of themselves
and other Stockholders of the
Houston and Texas Central
Railway Company, similarly
situated, who may come in and
contribute to the expenses of
this action,

Plaintiffs,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

Trial desired
in the County
of Queens.

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To the above named Defendant :

You are hereby summoned to answer the com-
plaint in this action, and to serve a copy of your

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Summons in State Court.

answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, New York, July 26, 1913.

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DITTENHOEFER, GERBER & JAMES,
Plaintiffs' Attorneys,
Office and Post Office Address,
No. 96 Broadway,
Borough of Manhattan,
New York City.

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Complaint in State Court.

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(Served July 28, 1913.)

NEW YORK SUPREME COURT,

COUNTY OF QUEENS.

HENRY L. BOGERT, TOWNSEND
LAWRENCE and ANITA LAW-
RENCE, as executors under the
last will and testament of
Walter B. Lawrence, deceased,
suing on behalf of themselves
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Houston and Texas Central
Railway Company, similarly
situated, who may come in and
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this action,

Plaintiffs,
against

SOUTHERN PACIFIC COMPANY,
Defendant.

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Trial desired
in Queens
County.

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The plaintiffs, complaining of the defendant, al-
lege as follows, on information and belief:

FIRST.—At all the times hereinafter mentioned,
the defendant Southern Pacific Company, was and
is a corporation organized and existing under and
by virtue of the laws of the State of Kentucky,
and the Houston and Texas Central Railroad Com-
pany, hereinafter called the Railroad Company,
was and is a corporation organized and existing

under and by virtue of the Laws of the State of Texas, and the Houston and Texas Central Railway Company, hereinafter called the Railway Company, was a corporation organized and existing under and by virtue of the Laws of the State of Texas.

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SECOND.—The Railway Company was at the times hereinafter mentioned in possession and engaged in the operation of various lines of railway in the State of Texas. The said Railway Company had issued and outstanding capital stock to the extent of 77,269 shares of the par value of \$7,726,900, all of which was fully paid and non-assessable.

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THIRD.—The plaintiff's testator, Walter B. Lawrence, at the time of his death, resided in the County of Queens and was at the times of the transactions and grievances complained of a resident of the State of New York, and a stockholder of the said Railway Company, and during all of said times he was and the plaintiffs now are the owners and holders of one hundred shares of said stock of said company at the par value of \$10,000. Said Stock had been purchased by the plaintiffs' testator at a high price, and the stock of the said Railway Company had been dealt in on the New York Stock Exchange for a number of years prior to the year 1888.

FOURTH.—That Walter B. Lawrence died on the 12th day of January, 1912, at Flushing, in the County of Queens, State of New York, leaving a last will and testament, which was duly admitted to probate by the Surrogate's Court of the County

of Queens, State of New York, on the 25th day of January, 1912, and that thereafter letters testamentary were duly issued to the plaintiffs, Henry L. Bogert, Townsend Lawrence and Anita Lawrence, who duly qualified as such executors, and have been and are now acting as such.

FIFTH.—The plaintiffs allege that the said Railway Company had received from the State of Texas large grants of land for the purpose of aiding in the building, construction and equipment of the lines of the said railway. At the time of the Reorganization Agreement hereinafter mentioned, the said company owned and held 4,500,000 acres of land, received as aforesaid from the State of Texas, which land was then and there of the value of about \$15,000,000.

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SIXTH.—Before the date of the Reorganization Agreement hereinafter referred to the said Railway Company had executed and delivered seven different mortgages to various trustees to secure seven different issues of bonds. Under each of said mortgages, except one, bonds secured respectively by the said mortgages, had been issued and were outstanding. Under one of said mortgages, known as the income and indemnity mortgage, all of the bonds which had been issued were called in, except one bond for Five Hundred Dollars, which was lost.

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SEVENTH.—The defendant, Southern Pacific Company, acquired and, at all the times hereinafter mentioned, held control of the majority of the stock of the said Railway Company, by reason of the following facts: In the years 1883 and 1884

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Morgan's Louisiana and Texas Railroad and Steamship Company, a Louisiana corporation, owned more than a majority of the outstanding capital stock of the said Railway Company, owning stock of the par value of about \$4,000,000 out of a total issue of \$7,726,900. In the early part of the year 1883 the Southern Development Company, a California corporation, acquired and thereafter held more than a majority of the capital stock of the said Morgan's Louisiana and Texas Railroad and Steamship Company. In 1885 the defendant, Southern Pacific Company, acquired from the Southern Development Company, and thereafter held, more than a majority of the capital stock of Morgan's Louisiana and Texas Railroad and Steamship Company. From and after the year 1885, when the defendant, Southern Pacific Company, so acquired control of more than a majority of the stock of the said Morgan's Louisiana and Texas Railroad and Steamship Company, the said defendant, Southern Pacific Company, by means of said control, selected and elected officers and directors of the said Railway Company, and said Southern Pacific Company controlled and dictated the policy of the said Railway Company and the action of its officers, attorneys and agents.

EIGHTH.—In or after the year 1885, the said Railway Company became involved in litigations with its secured and unsecured creditors. On February 11, 1885, the trustees of one of the mortgages upon part of the property of the Railway Company, brought a suit against the said Railway Company, but not a suit to foreclose the said mortgage. On the same day the same individuals, as trustees of another of the said mortgages upon

part of the property of the said Railway Company, commenced another suit against the said Railway Company, but not a suit to foreclose said mortgage. Each of said suits was commenced by bill in equity, filed in the United States Circuit Court for the Eastern District of Texas. In said suits the trustees under said mortgages complained that the said Railway Company had failed to make provisions for the sinking funds required respectively by said mortgages to be set aside, and had violated other terms and agreements contained in the said mortgages. The said trustees further alleged that the said Railway Company was diverting to other creditors' funds and the proceeds of lands which should be applicable to the mortgages whereof they were trustees, and alleged other grievances against the said Railway Company. To said two bills the Railway Company, on June 22, 1885, interposed answers, admitting some of the grievances complained of and denying others, and denying the right of complainants to any relief; and the said two suits were placed upon the docket of the said United States Circuit Court and numbered respectively 183 and 184. No further proceedings were taken in said suits for a long period of time thereafter.

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NINTH.—On February 16, 1885, the said Southern Development Company, the majority of the stock of which at the time was owned and controlled by the defendant, Southern Pacific Company, filed a bill in the said United States Circuit Court for the Eastern District of Texas, against the said Railway Company. In said bill the complainant alleged the existence of various mortgages upon various parts of the property of the said Rail-

- way Company, and alleged the amount of bonds outstanding under each of said mortgages; it alleged a floating indebtedness, due partly to itself, and claimed that said floating indebtedness was entitled to an equity superior to that of the mortgage bondholders. The bill alleged various other facts and circumstances; and six days after the same was filed, upon the consent of the said Railway Company, which, together with the complainant, the Southern Development Company, was controlled by the defendant, Southern Pacific Company, the Court in said suit appointed two individual receivers of the said Railway Company and its property.

TENTH.—On April 20, 1885, an amended bill was filed by the said Southern Development Company, alleging certain other and further alleged grievances in addition to those set out in its original bill.

- ELEVENTH.—On July 7, 1885, the said Railway Company filed its answer to the said suit of the said Southern Development Company, in which answer it admitted the necessity for the appointment of receivers.

TWELFTH.—On March 18, 1885, The Farmers' Loan & Trust Company, as trustee of one of the seven mortgages covering the property of the said Railway Company, filed its bill against the said Railway Company in the said United States Circuit Court for the Eastern District of Texas. In said bill of complaint the complainant alleged violation by the said Railway Company of various terms and stipulations contained in the said mort-

gage whereof the complainant was trustee, and alleged default in the payment of certain coupons due upon the bonds secured by various mortgages. It prayed for a decree requiring an accounting of the sales of certain lands covered by the said mortgage, and for an injunction and other relief. Neither this bill of complaint, nor any of the bills filed theretofore by the trustees of any of the mortgages, contained any allegation that the principal secured by the said mortgages had become due; nor was any foreclosure asked for or demanded in any of said bills of complaint.

THIRTEENTH.—On June 22, 1885, the said Railway Company filed its answer to the said bill of complaint of the said Farmers' Loan & Trust Company, denying some of said allegations and admitting others and denying the right of the complainant to any relief, and the said suit was entered on the docket of the said United States Circuit Court for the Eastern District of Texas as No. 188. The said suit remained on the said docket at issue, and no active steps were taken to press the same to trial.

FOURTEENTH.—On October 5, 1885, the Trustees of certain of the mortgages covering the property of the said Railway Company demurred to the bill of complaint of the Southern Development Company, which demurrer was thereafter and on May 27, 1886, sustained, and the said bill of the Southern Development Company dismissed.

FIFTEENTH.—On January 21, 1886, the Trustees of two mortgages covering different portions of the property of the said Railway Company, filed bills

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in equity in the said United States Circuit Court, for the Eastern District of Texas, demanding the foreclosure of the said mortgages. The said bills alleged default in the payment of interest due under said mortgages respectively and claimed that the said Railway Company by its acts had prevented the said trustees from taking possession of and operating the said portion of said railway, as they were entitled to do, in case of failure by the said Railway Company to pay interest. The said bills alleged other grievances, and alleged the insolvency of the Railway Company, and demanded that the property of the said Railway Company should be sold to prevent an irreparable injury.

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SIXTEENTH.—To said bills respectively the Railway Company interposed answers, denying some of the allegations of the said bills, and admitting others. In said answers the said Railway Company set up the fact that the principal sum of the bonds secured by the said mortgage had not become due and demandable by virtue of the matters and things alleged in the said Bill of Complaint. The said answers further pleaded the Statute of Limitations, and ratification by the said Trustees of certain of the wrongs complained of in the said Bills of Complaint. Said answers further averred that the said mortgages under which the said property was sought to be foreclosed covered only part of its system, and that its rolling stock belonged to its system as a whole and could not be apportioned among the different divisions. Said Railway interposed various other good and valid defenses to the said suits to foreclose and the said suits were placed upon the docket of the said United States' Circuit Court for the Eastern Dis-

strict of Texas, and known as suits No. 198 and No. 199. No effort was made to overcome the defenses interposed by the said Railway Company to the said suits to foreclose, and no steps were taken to bring the same to a hearing.

SEVENTEENTH.—On April 24, 1886, The Farmers' Loan & Trust Company, as Trustee of one of the mortgages covering property of the said Railway Company, filed a Bill of Complaint in said United States Circuit Court for the Eastern District of Texas, averring various defaults and breaches by the Railway Company of its contracts and obligations under the terms of the said mortgage. The said Bill of Complaint set up certain claims and sought certain relief against other creditors and against the Trustees of other mortgages who had theretofore filed Bills in the said Court. The said Complainant demanded relief that the property of the said Railway Company be sold in satisfaction of its claim.

EIGHTEENTH.—Neither the said mortgage of which the said The Farmers' Loan & Trust Company was Trustee, nor any of the other mortgages heretofore referred to, permitted a foreclosure or sale of the property for non-payment of interest, nor by the terms of said mortgages, or any of them, was the principal debt made due thereunder by reason of failure to pay interest nor had any of the said mortgages matured. On the contrary, each and all of the said mortgages provided that in the event of non-payment of interest, the Trustees of the said mortgages should be entitled to enter into and take possession of the portion of the Railway covered by the respective mortgages

and operate the same until the said arrears of interest were extinguished.

NINETEENTH.—On September 3d, and on September 9th, 1886, respectively, the Railway Company filed answers to the Bill of Complaint of the said Farmers' Loan & Trust Company to foreclose the mortgage of which it was Trustee, in which answers the said Railway Company denied certain allegation of the said Bill, and admitted others, and denied the right of said complainant to any relief, and put at issue the suit of the said The Farmers' Loan & Trust Company.

TWENTIETH.—On May 26th, 1886, all of said suits affecting the property of the said Railway Company were consolidated and numbered Cause No. 198 upon the docket of said Court. The Receivers appointed by consent in the suit of the Southern Development Company were discharged on May 27th, 1886, and the property placed in the hands of Receivers appointed in the consolidated cause No. 198.

TWENTY-FIRST.—In said consolidated cause No. 198, various pleadings had been filed by parties thereto, raising questions between different classes of mortgage creditors and the said Railway Company, and between various creditors of the said Railway Company as among themselves, and questions affecting judgment creditors of the said Railway Company, and questions as to whether or not the property of the said Railway Company could be sold in parcels or as an entirety, and questions as to what disposition should be made of the rolling stock of the Railway Company, if the Railway

could be sold in parcels, and questions as to whether or not the said Railway Company was acting in collusion with certain of its creditors as against others. The defenses to each and all of the suits interposed by the said Railway Company were never overcome in said litigations. Said defenses were valid, legal defenses to the said suits and each and all of them, and could not be overcome save by the consent of said Railway Company. The Railway Company had interposed the defense, among others, that none of the mortgages which the respective Trustees sought to foreclose could be foreclosed until there occurred a default in the payment of the principal of the said Bonds secured thereby; and that no default in the payment of the principal of the said bonds had occurred. The defenses to the suits of different creditors interposed by the said Railway Company were good, legal and valid defenses to the suits brought by the different Trustees and different classes of creditors, and the different classes of creditors were prevented from proceeding to judgment by said valid defenses, and also by the controversies which had arisen and were set up in the pleadings in the said cause between the creditors themselves. No step was taken to bring said cause on for a hearing. By interposing the answers and defenses hereinbefore referred to, the said Railway Company, which, throughout all of said period, was controlled by the defendant Southern Pacific Company, as aforesaid, had prevented and was preventing the foreclosure of any mortgage or lien upon its property.

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TWENTY-SECOND.—Thereafter negotiations were entered into between the defendant Southern

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Pacific Company and the holders of Bonds under six of the seven mortgages which had been placed upon the property of the said Railway Company, which resulted finally in the formation and execution in the City and State of New York of a Reorganization Agreement, a copy of which is hereto annexed as a part of this complaint and marked "Exhibit A." The said Agreement was executed by the Southern Pacific Company, by the Central Trust Company of New York and by a large number of holders of Bonds under each of the said six mortgages upon property of the said Railway Company referred to in said Agreement.

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TWENTY-THIRD.—By the terms of said Agreement the Southern Pacific Company, which controlled, as aforesaid, a majority of stock of the said Railway Company, was permitted and allowed to take stock of the proposed new and reorganized Company upon terms different from and better than the terms proposed by said agreement to be offered to the minority stockholders of the said Railway Company. By the said Agreement the said Southern Pacific Company had stipulated that all existing mortgages upon the property of the said Railway Company should be foreclosed, and had given to said Central Trust Company of New York the right to declare due the principal of the mortgages upon the property of the said Railway Company. Said stipulations could not be carried out by the said Southern Pacific Company, except through the control which the said Company held of a majority of stock of the said Railway Company, and control of the officers and attorneys for said Railway Company; and said stipulations were thereafter carried out by the said

Southern Pacific Company through and by means of the said control by the Southern Pacific Company of a majority of stock of the said Railway Company and control of the officers and attorneys of said Railway Company.

TWENTY-FOURTH.—The said Reorganization Agreement was thereafter carried out according to its terms, except, as hereinafter stated, it was not carried out in its provisions concerning the lands owned by said Railway Company. On April 30, May 1, May 2 and May 3, 1888, various new pleadings and answers were filed in the United States Circuit Court for the Eastern District of Texas, demanding the foreclosure and sale of all of the mortgages upon the property of the said Railway Company, to which pleadings the Railway Company interposed no defense; and on May 4, 1888, a consent decree of foreclosure was filed by which it was adjudged and decreed that the principal and interest of each and all of the said mortgages was due and payable, and that the whole property of the Railway Company should be sold in default of payment of the said mortgage indebtedness, which was fixed by the said decree at over \$19,000,000. 44 45

TWENTY-FIFTH.—The said decree was entered by consent of said Railway Company and all other parties to said suits, and had, prior to its presentation to the Court, been prepared and agreed to by the attorneys representing the parties to the said plan of reorganization, and especially by the attorney for the Southern Pacific Company. The good and valid defenses of the Railway Company to the foreclosure of the said mortgages were not

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insisted upon, but were withdrawn because the said Southern Pacific Company, by reason of its control of the said Railway Company, was able to and did procure the assent of the said Railway Company to the carrying out of the said plan of reorganization. The principal of the said mortgage bonds was not in fact due, and was found due only because the Southern Pacific Company had by the said Agreement given the Central Trust Company the right to declare the said principal due. The said Southern Pacific Company was able to and did procure the carrying out of the said Reorganization Agreement and the withdrawal of all defenses to said suits theretofore interposed by the Railway Company.

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TWENTY-SIXTH.—A foreclosure sale was thereafter held pursuant to the said decree of May 4, 1888, at which sale the property was bid in by Frederic P. Olcott, President of the Central Trust Company, acting for said Trust Company, and acting in pursuance of the said Reorganization Agreement. No part of the money or bonds paid, delivered or surrendered at the said sale, for the property, bid in by the said Olcott, belonged to him, but said money and bonds were furnished under and pursuant to the said Reorganization Agreement. At said foreclosure sale, the said Olcott also bought in all the said lands owned by the said Railway Company pursuant to said Reorganization Agreement. A new railroad corporation was organized pursuant to the terms of the Reorganization Agreement which was known as the Houston and Texas Central Railroad Company. To said new Company the said Olcott transferred the lines of railroad, rolling stock, etc.,

purchased at said foreclosure sale. The said Railroad Company thereupon executed bonds secured by three mortgages prepared, executed and delivered in accordance with the Reorganization Agreement which bonds were delivered to the Central Trust Company and by it distributed among the bondholders who had deposited their Bonds with said Trust Company under the Reorganization Agreement. All of the bondholders of the old Railway Company accepted said new bonds of the new Railroad Company, accordingly to the provisions of the Reorganization Agreement. The said lands purchased by said Olcott were transferred to certain Trust Companies as trustees for the benefit and use of the said new Railroad Company. 50

TWENTY-SEVENTH.—The Central Trust Company of New York as agent under the said Reorganization Agreement, thereafter required the plaintiff's testator and each minority stockholder of the Railway Company who wished to receive the benefits of said Reorganization Agreement to pay a prohibitive assessment, amounting to over Seventy Dollars for each share of stock held by the plaintiffs' testator and other minority stockholders; and no minority stockholder paid such assessment, and all of the \$10,000,000 (par value) of stock of the new reorganized Railroad Company was taken over by the defendant Southern Pacific Company on terms far more favorable to said Southern Pacific Company than the said terms offered to the plaintiff's testator and other minority stockholders, which said stock was delivered to and received by the said Southern Pacific Company in the City and State of New York. The 51

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Southern Pacific Company now holds and claims to own the whole of the stock of the reorganized Railroad Company. Said stock was and is now of great value. During the time since the said Southern Pacific Company acquired the said stock it has made great profit by its ownership and control of said stock in the way of dividends and otherwise.

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TWENTY-EIGHTH.—In order to acquire said stock under the Reorganization Agreement the said Southern Pacific Company undertook to guarantee certain obligations of the reorganized Railroad Company as appears from said Reorganization Agreement; but it has never been called upon to pay any sum on account of its said guarantees. The Southern Pacific Company was also required under said Reorganization Agreement to pay certain expenses and charges of reorganization the exact amount of which is not known to the plaintiff.

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TWENTY-NINTH.—The defendant, Southern Pacific Railroad Company acquired the said \$10,000,000 par value of stock of the reorganized Railroad Company through and by means of its ownership and control of a majority of stock of the Railway Company and through its control of the directors, officers and attorneys of said Railway Company; and through and by means of its power to cause the said Railway Company to withdraw defenses which it had interposed to the suits against the Railway Company, which defenses were interposed for the benefit of said Railway Company and all of the stockholders thereof; and through the consent which the said Southern

Pacific Company gave, and which it caused the said Railway Company to give, to the entry of a decree declaring due the principal of all of the mortgages upon property of the said Railway Company. The acquisition of the said \$10,000,000 par value of stock of the new Railroad Company was obtained by the said Southern Pacific Company in consideration of the performance by the said Railway Company of corporate acts and the withdrawal by the said Railway Company of defenses which had been interposed for the benefit of the said Railway Company and all its stockholders. The payment to the Southern Pacific Company of the said \$10,000,000 par value of stock of the new Railroad Company was a part of and in consideration of a composition between said Railway Company and its mortgage creditors, set out and described in said Reorganization Agreement. The mortgage creditors permitted and allowed the said Southern Pacific Company to take the whole capital stock of the new company in consideration of the withdrawal by the old Railway Company of defenses which prevented the foreclosures of mortgages. And the said Southern Pacific Company received the Ten Million Dollars of stock and obtained for itself better terms in the distribution of said stock than was given to the minority stockholders of the said Railway Company because of and by reason of its control of a majority of the stock of the said Railway Company, and of the officers, directors and attorneys of said Railway Company. When the said Southern Pacific Company received and accepted the said Ten Million Dollars of stock, it received the same charged and impressed with a trust for the benefit of the plaintiffs' testator and all other minority stockholders, and the said

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Southern Pacific Company now holds the said stock as such Trustee, and not in its own right.

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THIRTIETH.—Since the aforesaid foreclosure sale in 1888, the Railway Company has owned no property and has transacted no business. No meetings of stockholders of the Railway Company have taken place since September 8th, 1888, the date of the foreclosure sale, and no meetings of the directors of said company have been held since June 7th, 1890. And since 1890 said company has had no place of business.

THIRTY-FIRST.—As soon as the terms of the said Reorganization Agreement were announced and published, S. W. Carey, Cornelius MacArdell, Walter B. Lawrence, plaintiffs' testator, and other stockholders of the Railway Company protested against the terms of the said agreement, claiming that it practically gave the Railway Company to the Southern Pacific Company in fraud of the individual stockholders.

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THIRTY-SECOND.—Immediately after the entry of the said Consent Decree of May 4th, 1888, the said Carey, MacArdell, Lawrence and other stockholders of the said Railway Company formed a committee of stockholders to protect themselves from the frauds committed and proposed to be committed by the Southern Pacific Company under the said Reorganization Agreement and Consent Decree, and said committee of stockholders employed as counsel, Frederick R. Coudert, Edward M. Shepard and A. J. Dittenhoefer of New York City, Jefferson Chandler of St. Louis, and later on H. Snowden Marshall, Russell H. Landale, and David

Gerber, and from the commencement of their first suit, hereinafter mentioned, to the present day, the firm of Dittenhoefer, Gerber & James has been their attorneys of record.

THIRTY-THIRD.—Plaintiffs' intestate, the said MacArdell and other stockholders of said committee, before and prior to the commencement of the present action and the actions hereinafter set forth, did request the directors of the Railway Company to commence an action against the Southern Pacific Company and others for an accounting and other appropriate relief, so as to have restored to the individual stockholders of the Railway Company their proper share of stock in the new Railroad Company, to which the assets and property of the original Railway Company was turned over. The said directors failed, neglected and declined to commence any action against the Southern Pacific Company. That the said directors were selected and directed by the Southern Pacific Company which controlled the majority of the stock of the Railway Company, and their interests were inimical to those of the plaintiffs' intestate and the other individual stockholders of the Railway Company similarly situated. The present survivors of the directors remain allied with the Southern Pacific Company, so that no relief of any sort can be obtained by said individual minority stockholders through their aid.

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THIRTY-FOURTH.—After their efforts out of Court had failed to bring them any relief, the said individual stockholders represented at that time by the plaintiffs' intestate, the said McArdle and Stephen W. Carey and others owning over 18,000

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shares of stock, which was all owned by them prior to the entry of the said Consent Decree of May 1888, commenced an action in the United States Circuit Court in Texas, in December, 1889, for the benefit of the said association of minority stockholders against the Houston and Texas Central Railway Company, certain Trust Companies and individuals and corporations, including the Southern Pacific Company, attacking said foreclosure proceedings and consent decree. The plaintiffs who appeared in said action were Stephen W. Carey, Warren S. Sillocks, J. Van Schaick, D. P. Ingraham, Jr., James Landale, George Wilson and Andrew S. McClelland.

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THIRTY-FIFTH.—In 1890 an injunction was obtained in said Carey case, which was afterwards set aside, and various motions were made in the Circuit Court, and before different Justices of the United States Supreme Court in Washington. The case was tried in 1892 and decided against the plaintiffs. Appeals were taken in due course to the Circuit Court of Appeals and United States Supreme Court, and the case was finally terminated in the United States Supreme Court, in 1896.

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THIRTY-SIXTH.—Shortly after said Carey case was started in Texas, and in August, 1891, the said Cornelius MacArdell, another member of the said Committee of Stockholders, in the interest of the said Committee and the minority stockholders of the Railway Company, commenced an action in the New York Supreme Court against the Southern Pacific Company, the said Olcott, the Central Trust Company and others, and sought an injunction restraining the said Olcott from parting with the

lands held by him under the said Consent Decree, and preventing the said Olcott and the other defendants from carrying out the terms of the Reorganization Agreement and the said Consent Decree, pending the trial of the action, which asked judgment that the said foreclosure sale be vacated and the Reorganization Agreement be annulled upon the ground of fraud, and that the defendants therein restore to the Railway Company the land, franchises and properties which had been taken from it under said decree of foreclosure.

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THIRTY-SEVENTH.—In due course the said action was tried in March, 1902, at Special Term, New York Supreme Court, and was decided on June 16th, 1903, and judgment entered August 25th, 1903, in favor of the defendants, the Court holding that said foreclosure judgment was not obtained fraudulently. The plaintiffs appealed in September, 1903, and the Appellate Division affirmed the judgment in April, 1905, and in July, 1905, the plaintiffs appealed to the Court of Appeals, which in October, 1907, affirmed the judgment in favor of the defendants, by a divided court holding that the complaint did not set forth a cause of action by appellants as minority stockholders directly and solely against the Southern Pacific Company, as a majority stockholder, based upon a trust relationship to compel the latter to account directly to the former for the properties and stock which it held, and had obtained through said Reorganization Agreement and foreclosure decree, in violation of said trust relationship. The minority judges held that the complaint was broad enough to cover the appellants' contention that as the Southern Pacific Company, the majority stockholder of the

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Railway Company, had received the entire issue of \$10,000,000 of stock of the Railroad Company, the appellants should have an accounting and that a trust was impressed upon the property of the old Railway Company, now in the hands of the Southern Pacific Company, for the benefit of the minority stockholders, and that, therefore, the judgment appealed from should be reversed, and the Southern Pacific Company account to the minority stockholders for their share of the said Railroad stock.

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THIRTY-EIGHTH.—In February, 1908, within four months of the final decree in the MacArdell case, Walter B. Lawrence, another member of the said committee of stockholders, and the plaintiffs' testator herein, in behalf of the said stockholders, commenced another action on the lines indicated by the New York Court of Appeals in their decision in the said MacArdell case, in the Supreme Court of New York, against the Southern Pacific Company, the said Olcott, the Central Trust Company and others, to compel the Southern Pacific Company to account to the stockholders of the Railway Company for the properties and assets of the said Railway Company it obtained through the Reorganization Agreement and Consent Decree in fraud of the rights of the said minority stockholders, and to compel the said Southern Pacific Company to distribute to the said minority stockholders of the Railway Company the shares of stock of the Railroad Company that they would be found entitled to on an accounting; the said complaint supplying the omissions in the MacArdell complaint and rectifying it as suggested by said Court of Appeals. In March, 1908, the defendants removed said action to the Circuit Court

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of the United States for the Eastern District of New York on the ground of diversity of citizenship. Several motions were thereafter made unsuccessfully by complainants in said suit to remand the case to the State Court. In October, 1909, an order to show cause was obtained by the defendants why the complaint should not be dismissed on the ground of lack of jurisdiction of the Circuit Court to proceed without the Railway Company as a party defendant. In July, 1910, the Court decided the said motion in favor of the defendants and directed that the action should be dismissed for lack of jurisdiction in the Court to proceed unless the Railway Company was brought in as a party within a reasonable time. As said Railway Company was no longer carrying on business, and had no officer or director attending to its business, and upon whom service of process could be made, it could not be brought into the action as a party. Therefore, final judgment was entered in September, 1910, dismissing the said action for lack of jurisdiction. An appeal was taken to the United States Supreme Court on September 23rd, 1910, which said Court dismissed for lack of jurisdiction in April, 1913.

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THIRTY-NINTH.—That the minority stockholders of the said Houston and Texas Central Railway Company, situated similarly to this plaintiff, are very numerous, exceeding one hundred in number, and that the names and places of residence of all of the said stockholders are unknown to plaintiff, and it will be impracticable to bring them all before the Court. That this action is brought on behalf of the plaintiffs for their own benefit, and of all of the other stockholders of the said Houston and Texas Central Railway Company similarly situated who

may come in and contribute to the expenses of this action, and receive the benefits thereof.

WHEREFORE, the plaintiffs demand judgment :

77 FIRST.—That it be adjudged and decreed, that the defendant, Southern Pacific Company, acquired and holds the said \$10,000,000 par value of capital stock of the Houston and Texas Central Railroad Company, and all profits and earnings which it has received or may receive from holding said stock as Trustee for the plaintiffs and other minority stockholders of the Houston and Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action, in accordance as the respective rights of the said defendant, Southern Pacific Company and the said minority stockholders may be adjusted by the Court.

78 SECOND.—That an accounting be had, and that the Southern Pacific Company be required to account for all stocks, moneys, property, benefits and advantages which it received, acquired, became or is entitled to pursuant and in furtherance of or because of the execution of the Reorganization Agreement hereinbefore referred to, and that on such accounting the said Southern Pacific Company be credited with such moneys as it may have paid on account of guarantees and expenses of carrying out the said reorganization and be given all other proper credits; and that it be decreed to hold the balance in trust, to be ratably distributed among all the shareholders of the Houston and Texas Central Railway Company in proportion to the holdings of such shareholders in said Railway Company; and for such other and further relief

as may seem just and proper, with the cost and disbursements of this action.

DITTENHOEFER, GERBER & JAMES,
 Plaintiffs' Attorneys,
 Office & Post Office Address,
 No. 96 Broadway,
 Borough of Manhattan,
 New York City.

EXHIBIT A.

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*Agreement for the Reorganization of the Houston
 & Texas Central Railway Company.*

Agreement made this twentieth day of December, in the year one thousand eight hundred and eighty-seven, by and between the undersigned holders of the first mortgage (main line) bonds of the Houston and Texas Central Railway Company, parties of the first part; the undersigned holders of the first mortgage (Western division) bonds of said railway company, parties of the second part; the undersigned holders of the first mortgage (Waco and Northwestern division) bonds of said railway company, parties of the third part; the undersigned holders of the consolidated mortgage (main line and Western division) bonds of said railway company, parties of the fourth part; the undersigned holders of the consolidated mortgage (Waco and Northwestern division) bonds of the said railway company, parties of the fifth part; the undersigned holders of the general mortgage bonds of the said railway company, parties of the sixth part; the Southern Pacific Company, a corporation organized under the laws of the State of

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Kentucky, party of the seventh part; and the Central Trust Company of the City of New York, party of the eighth part.

Whereas, the undersigned parties of the first, second, third, fourth, fifth and sixth parts are respectively holders of the bonds of the said Houston and Texas Central Railway Company of the classes above designated respectively to the amounts set opposite their respective signatures hereto, and of the unpaid coupons appertaining to such bonds maturing at dates subsequent to January 1, 1885 (except the first-mortgage coupons maturing July 1, 1885), which have been paid, and the said Southern Pacific Company is interested in connecting roads in conjunction with which it desires such Houston and Texas Railway to be operated.

And whereas, in order to secure as promptly as may be a reorganization of said railway company, and an adjustment of the respective interests of the several parties hereto in respect to the property of said company, the said parties hereto have agreed to the following—

Plan of reorganization.

All existing mortgages (with the possible exception of those upon the Waco and Northwestern division) to be foreclosed, and a new company organized, which shall acquire all the property and franchises of the present railway company, and thereafter issue new bonds, equal in amount to the principal of the outstanding first mortgage, consolidated mortgage and general mortgage bonds; that is to say: A new first mortgage to be executed upon the entire line of railroad, its franchises, stations, shops, terminal facilities, roll-

ing stock and equipments, and upon all the lands now covered by all three of the present first mortgages for an amount equal to the principal of all the outstanding first mortgage bonds as hereinafter provided.

Also a new mortgage to secure bonds equal in amount to the principal of all the outstanding consolidated mortgage bonds of both classes, as hereinafter provided, which said new mortgage is to be a second mortgage upon the whole line of railroad, its franchises, stations, shops, terminal facilities, rolling stock and equipment, and a first mortgage upon all the lands now covered by both consolidated mortgages, as also upon the town lots belonging to said railway company.

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And also a new general mortgage subject to the liens, rights and priorities of the above mentioned new mortgages, which shall cover all the property of said railway company to secure bonds of an amount equal to the principal of the outstanding general mortgage bonds as hereinafter provided.

In the event that this agreement shall not be accepted by the holders of at least sixty (60) per cent. of the existing bonds secured by the first mortgage on the Waco and Northwestern division, or if for any reason it should be found that said first mortgage upon said division cannot be foreclosed without delaying this reorganization, then the holders of said Waco and Northwestern division first-mortgage bonds are not to participate in this reorganization, and the consolidation of mortgage bonds and mortgages as above proposed is to apply only and to be limited to the bonds and mortgages issued upon the main line and Western divisions of said roads, and the security for the new mortgage bonds is to be limited accordingly.

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The new first-mortgage bonds to be issued for exchange for existing first-mortgage bonds as aforesaid to have fifty years to run from July 1, 1887, with interest payable semi-annually thereafter, at the rate of five (5) per cent. per annum the interest to be guaranteed by the Southern Pacific Company and both interest and principal to be payable in gold.

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The said new first-mortgage bonds to be exchanged, bond for bond, with the holders of the old first-mortgage bonds participating herein, and in addition thereto the said holders of the old first-mortgage bonds participating herein to be paid the face value (without interest) of the unpaid coupons or unpaid portions of coupons appertaining to such bonds deposited by them up to and including the coupons maturing July 1, 1887, and also a bonus of fifty dollars in cash upon each bond, such bonus to be paid at the time of the deposit of said bond, upon the terms and conditions hereafter prescribed.

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The new consolidated mortgage bonds to be issued and secured by mortgage as above to an amount equal to the amount of the principal of the consolidated mortgage bonds now outstanding.

The said new consolidated mortgage bonds to mature October 1, 1912, with interest from Oct. 1, 1887, payable semi-annually, at the rate of six (6) per cent. per annum, the interest to be guaranteed by the Southern Pacific Company, both principal and interest to be payable in gold, and to be exchanged bond for bond, with the holders of the old consolidated mortgage bonds participating herein.

In addition thereto, the holders of said consolidated bonds participating herein to be given debenture bonds of the new company, payable in ten

years from October 1, 1887, with interest thereon payable semi-annually, at the rate of six (6) per cent. per annum for three-fourths of the face value (without interest) of the unpaid coupons upon said old bonds deposited by them, to and including those maturing Oct. 1, 1887, both the principal and interest of said debenture bonds to be guaranteed by the Southern Pacific Company.

This issue of new consolidated mortgage bonds is to include bonds of the par value of one million one hundred and forty-nine thousand (\$1,149,000) dollars to take up the old consolidated mortgage bonds of like amount heretofore surrendered to the Farmers' Loan and Trust Company as trustee of the existing general mortgage, and in lieu of which general mortgage bonds were issued.

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Said bonds are to be delivered and held by the trustee of the general mortgage hereinafter provided for, but only as collateral security for the bonds to be issued under that mortgage, and are not to draw interest or to be subject to redemption from the proceeds of land sales until default made under the mortgage and the becoming due of the principal of all the bonds issued thereunder, and no debenture bonds are to be issued on account of the coupons appertaining to said existing bonds so held by the Farmers' Loan and Trust Company, and when such issue of new general mortgage bonds shall have been paid, the new company shall be entitled to the return to it on demand of such collateral consolidated mortgage bonds.

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The holders of the present consolidated mortgage bonds assenting hereto depositing their bonds, except the holders of said one million one hundred and forty-nine thousand (\$1,149,000) dollars of said bonds, to pay at the time of such deposit a

sum equal to three-fourths of one per cent. of the principal of the bonds so deposited, which shall be applied on account of the charges, expenses and disbursements of the committee of the consolidated mortgage bondholders as hereinafter provided.

New general mortgage bonds secured by mortgage as above set forth to be issued to the amount of the principal of the general mortgage bonds now outstanding, including the 945 general mortgage bonds heretofore hypothecated to the Southern Development Company, Morgan's Louisiana and Texas Railroad and Steamship Company, and the National City Bank; said new general mortgage bonds to mature April 1, 1921, and to bear interest, payable semi-annually, at the rate of four (4) per cent. per annum from October 1, 1887, the interest thereon to be guaranteed by the Southern Pacific Company and both principal and interest to be payable in gold. Such new bonds to be exchanged, bond for bond, with the holders of the existing general mortgage bonds participating herein; the Southern Development Company and Morgan's Louisiana and Texas Railroad and Steamship Company, which are now the pledgees of eight

hundred and eighty of the existing bonds, to take the same number of new bonds at par, in cancellation of \$880,000 of the indebtedness to them of the present railroad company; and in addition thereto such holders of the existing general mortgage bonds to be given debenture bonds of the new company, payable ten years from October 1, 1887, bearing interest payable semi-annually at the rate of four (4) per cent. per annum, for two-thirds of the face value (without interest) of the unpaid coupons appertaining to the said existing general mortgage bonds deposited by them to and including the cou-

pons maturing October 1, 1887, both principal and interest of said last mentioned debenture bonds to be guaranteed by the Southern Pacific Company.

The holders of the present general mortgage bond and of the Farmers' Loan and Trust Company trust certificates therefor who shall deposit their bonds or cause or authorize bonds to be deposited hereunder, or who shall assent hereto, to pay a sum equal to three-fourths of one per centum of the principal of the bonds so deposited or assented respectively, which sum shall be payable at the time of such deposit or assent and shall be applied on account of the charges, expenses and disbursements of the committee of general mortgage bondholders as hereinafter provided.

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The capital stock of the new company to be ten millions of dollars (\$10,000,000), to be issued and divided *pro rata* among such holders of the floating debt of the said railway company as within a time to be prescribed by the said party of the eighth part may provide a *pro rata* share, proportionate to the whole of the floating debt of the company, of the cash payments to be made under this plan for interest and bonus to holders of the first-mortgage bonds and coupons, and otherwise, in carrying out the provisions of this agreement.

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Provided, however, that the present holders of the capital stock of the Houston and Texas Central Railway Company, may, within a time to be prescribed by the said trust company therefor, if they should elect so to do, provide their *pro rata* share, proportionate to the whole outstanding capital stock of the present company, of the amounts requisite to discharge the whole floating debt of the company, and to provide for the cash payments above referred to and for the other necessary

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charges and expenses to be incurred in this reorganization; and in that event such stockholders shall be entitled to receive a like proportionate part of the stock of the reorganized company; and in the event that any portion of such capital stock of the present company, of the holders of the floating indebtedness of the said railway company, or by the stockholders thereof as above provided, then the Southern Pacific Company, or its appointee, upon providing such portion of the cash payments to be made hereunder for interest and bonus to the holders of the first-mortgage bonds and coupons, and for other necessary charges and expenses to be incurred in this reorganization as herein provided, as shall not have been so provided by the floating-debt creditors and stockholders of said railway company, is to be entitled to the entire balance of the stock of the new company not so taken up; and in the further event that the Southern Pacific Company, or its appointee, shall not make provision therefor within thirty (30) days after notice to it in writing of the amount so remaining unpaid, then so much of said stock as shall be necessary is to be sold to meet such cash payments, charges and expenses.

Syndicate.

A syndicate or syndicates, to be formed, if necessary, for the purpose of facilitating the conversion of the outstanding bonds, and the carrying out of this reorganization.

Now, therefore, for the purpose of carrying this plan of reorganization into effect, this agreement witnesseth:

That the parties hereto, for and in consideration of the mutual covenants and agreements herein

contained, and the sum of one dollar by each of the parties hereto to the others in hand paid, the receipt whereof is hereby acknowledged (the said several parties each covenanting and agreeing for himself, herself or itself only, and not incurring any obligation for any other thereby), covenant and agree as follows, to wit:

FIRST.—The said Central Trust Company, party of the eighth part, shall be, and it is, hereby appointed a purchasing trustee, by itself, or through such agencies as it may designate in that behalf; to exercise the powers and perform the duties hereinafter set forth; and the said Central Trust Company hereby assents to act in that capacity.

SECOND.—The parties of the first, second, third, fourth, fifth and sixth parts hereto, holders of the several classes of bonds of said railway company, being the owners or representatives of the owners of said bonds to the amount of bonds respectively set opposite their names, together with the unpaid coupons above mentioned thereunto appertaining, will deposit the same with the said Central Trust Company upon notice therefrom being given as hereinafter provided, and accept in lieu of said bonds and coupons a certificate, or certificates of deposit therefor, such certificates to be in form suitable for listing upon the New York Stock Exchange; and they will in all cases, execute good and sufficient transfers of their said bonds and coupons in a form to be determined by said Central Trust Company, and deposit the same with the said trust company, so that the legal title to the said bonds and coupons shall become vested in the said trust company for the use, and subject to the

control of said trust company as trustee for the purposes of this agreement.

107 There shall be paid to the depositors of such first-mortgage bonds and coupons at the time of depositing the same the sum of fifty (\$50) dollars upon each bond so deposited, and the Southern Pacific Company, party of the seventh part, agrees to furnish to said Central Trust Company the amount necessary to pay said sums and shall be repaid therefor with interest out of the moneys to be raised by the stockholders, the floating-debt holders and by other methods hereinafter provided for defraying the charges and expenses of this reorganization.

108 In the event that this reorganization should fall through and the Central Trust Company should determine to return the bonds so deposited to the holders of the certificates therefor, then as a condition precedent to the return of said first-mortgage bonds the bonus so paid as aforesaid shall be repaid without interest by each first-mortgage certificate-holder to the said Central Trust Company, for the use and benefit of and for repayment on demand to the said Southern Pacific Company, and said Southern Pacific Company shall have a lien on such bonds for such payment.

The parties of the fourth part, other than the holders of the \$1,149,000 of existing consolidated mortgage bonds now held by said Farmers' Loan and Trust Company, further agree to pay to the said trust company at the time of making deposit of their bonds a sum equal to three-fourths of one per cent. of the principal of the bonds so deposited, to be turned over by the said Central Trust Company to Albert S. Rosenbaum, Esq., as chairman of the committee of the consolidated mortgage

bondholders, to be applied by him or them on account of their charges, compensation, expenses and disbursements in the effecting of this reorganization, but the Farmers' Loan and Trust Company, as the holder of said one million one hundred and forty-nine thousand (\$1,149,000) dollars of existing consolidated mortgage bonds shall not be required to contribute to such charges and expenses.

The parties of the sixth part (being the holders of existing general mortgage bonds and of the Farmers' Loan and Trust Company trust certificates therefor) who shall deposit their bonds or cause or authorize such bonds to be deposited hereunder, or who shall assent hereto, further agree to pay to the said Central Trust Company a sum equal to three-fourths of one per cent. of the principal of the bonds so deposited or assented respectively, to be turned over by said trust company to Henry Budge, Esq., as chairman of the committee of said general mortgage bondholders, and to be applied by him or them on account of the charges, compensation, expenses and disbursements of said committee. Said sums shall be payable forthwith on deposit of bonds hereunder and must be paid before the new negotiable trust certificates or other securities hereinafter provided for can be delivered.

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The Southern Development Company and Morgan's Louisiana and Texas Railroad and Steamship Company by signing this agreement covenant that as to themselves the eight hundred and eighty bonds hypothecated to them shall be regarded as assenting bonds and shall be charged as such with all the obligations which this agreement may or does impose on the general mortgage bonds or the holders thereof.

As regards the sixty-five bonds claimed by the National City Bank to have been hypothecated to it, the said Central Trust Company is hereby authorized and empowered to make such settlement with said bank as to said trust company in its discretion shall seem just and right to all concerned, subject, however, to the collection on the said bonds of the assessment of three-fourths of one per centum herein provided.

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And the parties of the sixth part hereby assign, transfer, set over and convey unto the said Central Trust Company all their right, title and interest, security and lien in, to and upon the railroad, lands, and other property of the Waco and Northwestern division of said railway company, under and by virtue of any of the mortgages thereon as well as by reason of any and all bonds issued upon said division and now held by or for the benefit of the parties of the sixth part, and they do hereby nominate and appoint the said Central Trust Company their true and lawful attorney irrevocable and with power of substitution, to collect and receive all such sums of money, proceeds and prop-

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erty as may hereafter become due and payable or be realized upon the bonds hereby surrendered by the parties of the sixth part under any foreclosure of any of the present mortgages upon said Waco and Northwestern division or either of them or any sale thereunder or otherwise; all such sums of money, proceeds and property to be applied by said Central Trust Company towards the purchase and cancellation or further security as in the case may be, first, of the new interest-bearing consolidation mortgage bonds hereinafter provided for, and second, of the new general mortgage bonds; the foregoing provision being made for the

contingency that the new consolidated mortgage bonds cannot be made a lien upon the said Waco and Northwestern division, otherwise the said provision not to be operative.

THIRD.—The said trust company shall invite, by proper publication to be determined by it, the holders of all classes of such securities to assent to and become parties to this agreement, by signing the same, and by depositing and transferring their securities, and receiving the certificates as herein provided, and shall fix the time within which it may be done; and after the expiration of the time so to be fixed and limited, no holder of any such securities of any class, who shall not within the time so fixed and limited have complied with the provisions of this agreement by depositing the securities and making such transfers, shall have, or be entitled to have, any of the rights or privileges herein provided, nor be entitled in any way to participate in the benefits of this agreement.

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Provided, however, that the said trust company shall have the power in its discretion, to extend or reopen the time so fixed and limited, but such extension or reopening shall be held and construed only for the benefit of such persons as shall actually deposit their securities and make such transfers within the time as so extended or reopened.

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And provided further, that the said trust company shall have power in its discretion, at any time, to admit to a participation in such privileges and to the new securities to be issued hereunder and the benefit thereof, any security-holder belonging to either of the classes entitled to participate in such benefits, upon such terms and conditions, and under such penalties as the said trust com-

pany shall in its discretion see fit to impose; but such action on the part of said trust company shall not be deemed or taken to establish any privilege for any other non-assenting security-holder.

And the said trust company shall also have full power in its discretion to make equitable provision in any case of lost or destroyed bonds or coupons or detached coupons.

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FOURTH.—Whenever, in the judgment of the said trust company, a party of the eighth part, a sufficient number of all or any of the classes of bonds and coupons hereinbefore referred to (but not less in any case than sixty [60] per cent. of the outstanding amount of each class, other than the first-mortgage and consolidated mortgage bonds of the Waco and Northwestern division of said railroad), shall have assented to this agreement, said trust company shall give notice by proper publication, to be determined by it, of such fact, and that it will proceed with the further execution of the duties hereby imposed upon and assumed by it as purchasing trustee, as aforesaid. The sixty per cent. of the outstanding bonds in the foregoing portion of this paragraph mentioned, is to be computed in the case of the consolidated mortgage bonds upon the amount of such bonds outstanding other than the \$1,149,000 in par value thereof held by the Farmers' Loan and Trust Company as herein set forth, and in the case of the general mortgage bonds upon the amount of such bonds outstanding other than the nine hundred and forty-five thousand dollars in par value thereof, hypothecated by the present railway company to Morgan's Louisiana and Texas Railroad and Steamship Company, the Southern Development Company, and the National City Bank.

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The said trust company may, at its election, if in its opinion a sufficient number of all, or any, of the classes of bonds or coupons hereinbefore referred to shall not have been deposited according to this agreement, return any and all classes of bonds and coupons to the owners thereof without charge or expense to them other than those incurred by or to their several committees, except, however, that all such bonds and coupons shall not be returned for, or by reason of any failure to deposit Waco and Northwestern division bonds.

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In the event that this agreement shall not be accepted by at least sixty (60) per cent. of the holders of the said first-mortgage bonds of the Waco and Northwestern division, or if, for any reason, it should be found that the said division cannot be included in this reorganization without delaying the same, then the said trust company shall proceed to execute this agreement and to carry out the proposed reorganization without participation therein of the holders of the first-mortgage bonds upon said Waco and Northwestern division, and the bonds of that division theretofore deposited shall be returned to the holders of the certificates therefor without charge; but such failure to participate on the part of the Waco and Northwestern division bondholders shall not affect the issue of consolidated mortgage bonds as hereinafter provided for the security of the new general mortgage bonds.

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The parties hereto authorize and request the Farmers' Loan and Trust Company and Messrs. James Rintoul and Nelson E. Easton, holding old consolidated mortgage bonds as trustees, to surrender the same to the party of the eighth part for exchange or cancellation or otherwise facilitating the carrying out this agreement.

FIFTH.—When in the judgment of the said trust company, party of the eighth part hereto, a sufficient number of all or any of the classes of bonds hereinbefore referred to shall have been deposited under this agreement, being not less than the amount hereinabove specified, it shall proceed, by any and all legal and proper means, to procure, or cause to be procured, by a foreclosure of the mortgages upon and a sale of all of the property of said railway company, such sale to be had as an entirety if practicable, under the decree or decrees of a court or courts of competent jurisdiction.

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And for the purposes of this agreement it may assist in the prosecution or become a party to any and all suits now pending or which may hereafter be brought, affecting said property; and shall have, and is hereby given power and authority, in its option, to declare the principal of the bonds deposited hereunder to be due.

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And at any sale of any property of the said railway company, or any part thereof, it is hereby authorized and empowered, in its own name, or in the name of such agent or agents as it may designate, to bid and pay for such properties, such sums, as in its judgment may be necessary to protect the interests of the parties hereto.

SIXTH.—The said trust company, party of the eighth part, shall cause a new corporation to be formed and incorporated under the laws of the State of Texas, with power to acquire all the property and franchises which the said trust company, by itself or its designated agents, may purchase or may have purchased at said sale or sales.

And the said trust company, or its designated agents, shall have the right to appoint such asso-

ciates, and to cause to be subscribed for and actually paid in cash all such amounts as shall be necessary to complete the valid organization of said new corporation in conformity with the laws of the State of Texas, and in all respects to take all steps and do such acts, including the selection and qualification for such associates, as it shall be advised by counsel are requisite and necessary to effect the valid organization of the said new corporation.

SEVENTH.—The said trust company shall convey, or cause to be conveyed, the franchises and property so purchased by it, or by its designated agents, as aforesaid, to such new company, and shall accept and receive in payment therefor the following amounts of the stock and bonds of the said new company (being the total issues thereof); that is to say:

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1. First-mortgage bonds to the same amount, as their par value, as the principal of the now outstanding first-mortgage bonds of the classes participating herein, to be secured, in the event that the holders of the existing first-mortgage (Waco and Northwestern division) bonds participate herein, by a first mortgage upon the entire line of the railroad, its franchise, stations, terminal facilities, rolling stock, and equipment, and upon all the lands now covered by all three of the existing first mortgages upon the several divisions of said road; and in the event that the holders of said Waco and Northwestern division first-mortgage bonds shall not participate herein, such mortgage shall be upon the railroad franchises, station, terminal facilities, rolling stock and equipment of the

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main line and Western divisions only, and upon all lands covered by the existing main line and Western division first mortgages; the issue of such new first-mortgage bonds in no event to be greater in amount than the principal of the old first-mortgage bonds outstanding upon the divisions included in the new first mortgage; due provision being made as heretofore for the amount due the State of Texas for loans from the school fund.

131

Said new first-mortgage bonds shall be payable in fifty (50) years from July 1, 1887, with interest at the rate of five (5) per cent. per annum, payable semi-annually, both principal and interest to be payable in gold coin.

132

2. Mortgage bonds of the same amount as the principal of the classes of the outstanding consolidated mortgage bonds participating herein, to be secured, in the event that the Waco and Northwestern division shall be included in this reorganization by a second mortgage upon the entire line of railroad, its franchises, stations, terminal facilities, rolling stock and equipment, and by a first mortgage upon the lands now covered by the existing consolidated mortgages upon the several divisions of said road, as also upon all the town lots, belonging to said railway company, however acquired; and in the event that the said Waco and Northwestern division shall not be included in this reorganization, then such mortgage shall be upon the main line and Western division only of said road, its franchises, stations, terminal facilities, rolling stock and equipment, and upon the lands now covered by the said main line and Western division consolidated mortgages; and also upon said town lots and upon all such rights, interests and

equities as shall have been or may be acquired under this agreement by the party of the eighth part in the franchises and property of said Waco and Northwestern division. Said new bonds shall be payable on October 1, 1912, and shall bear interest at the rate of six (6) per cent. per annum from and after October 1, 1887, payable semi-annually, both principal and interest to be payable in gold coin; it being understood and agreed that bonds shall be issued sufficient in amount to include the consolidated mortgage bonds to the par value of One million one hundred and forty-nine thousand Dollars (\$1,149,000) heretofore deposited by the present railway company with, and now held by, the Farmers' Loan and Trust Company, the trustee named in the existing general mortgage, and in place of which general mortgage bonds have heretofore been issued.

134

Said new consolidated mortgage bonds in par value of One million one hundred and forty-nine thousand (\$1,149,000) Dollars are to be delivered to the trustee of the new general mortgage, hereinafter mentioned; provided, however, that until the existing main line and Western division consolidated mortgage bonds now held by the Farmers' Loan and Trust Company, as trustee, shall have been surrendered or the lien thereof extinguished the same amount of the new consolidated mortgage bonds shall be held by the party of the eighth part hereto for the protection of and for the benefit of the new general mortgage bonds, but subject to such equities as may exist or arise by reason of the non-extinguishment of the lien of said existing bonds; it being intended that the new general mortgage bonds shall have the benefit of the new consolidated mortgage bonds, so to be issued in lieu

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of all benefit and advantage which they, or the bonds for which they are to be exchanged, would have by reason of the consolidated mortgage bonds now held by the Farmers' Loan and Trust Company as aforesaid.

- 137 That said one million, one hundred and forty-nine thousand (\$1,149,000) Dollars of new consolidated mortgage bonds shall be held only as collateral security for the new general mortgage bonds hereinafter mentioned, and the proceeds thereof under any foreclosure sale or other liquidation of such security shall be applied towards the payment of said new general mortgage bonds, but said one million one hundred and forty-nine thousand (\$1,149,000) Dollars of new consolidated mortgage bonds shall not draw interest or be subject to redemption from the proceeds of land sales until default is made on said new consolidated mortgage and the principal of all the bonds issued thereunder declared due, as hereinafter provided, upon the happening of which events said bonds shall be entitled to draw interest from the date of the maturity of the last coupons paid by the new
- 138 railway company upon the others of said new consolidated bonds and shall thereafter be treated in all respects the same as the other new consolidated bonds, provided that when the issue of new general mortgage bonds shall have been paid, the new company shall be entitled to the return to it on demand of such collateral consolidated mortgage bonds.

3. Mortgage bonds to the same amount as the principal of the general mortgage bonds now outstanding, including the general mortgage bonds heretofore hypothecated to the Southern De-

velopment Company, Morgan's Louisiana and Texas Railroad and Steamship Company, and the City Bank; such new bonds to be secured by a mortgage upon all the property of said railway company subject to the respective liens, priorities, and rights of the several mortgages above set forth.

Said new general mortgage bonds shall be payable on April 1, 1921, and shall bear interest at the rate of four (4) per cent. per annum from and after October 1, 1887, payable semi-annually, both principal and interest to be payable in gold coin.

140

4. Debenture bonds of the new company, payable in ten (10) years from October 1, 1887, bearing interest at the rate of six (6) per cent. per annum, payable semi-annually, for three-fourths the face value (without interest) of the unpaid coupons of the several classes of consolidated mortgage bonds participating herein, maturing on or prior to October 1, 1887.

5. Debenture bonds of the new company, payable in ten (10) years from October 1, 1887, bearing interest at the rate of four (4) per cent. per annum, payable semi-annually for two-thirds of the face value (without interest) of the unpaid coupons of the general mortgage bonds maturing on or prior to October 1, 1887, other than those appertaining to the 880 bonds heretofore hypothecated to Morgan's Louisiana & Texas Railroad and Steamship Company and the Southern Development Company.

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6. Stock to the amount of ten million dollars.

7. The interest on all classes of the new bonds hereinbefore provided for, as also the principal of said debenture bonds shall be guaranteed by the Southern Pacific Company, party of the seventh part hereto.

143

Said new first mortgage and said new consolidated mortgage shall contain provisions authorizing the sale free and discharged from the liens of such mortgages of the lands, including the town lots; covered by them respectively and also provisions authorizing and requiring the new company to purchase, with the proceeds of the sales of such lands covered by such respective mortgages, bonds of the class secured thereby, at the market rates, not exceeding One hundred and ten (110) per centum of the par value thereof and accrued interest; and that in the event that the bonds cannot be purchased at or below that rate, the said new railway company shall be authorized and required at least once in each year to draw such bonds by lot to be paid for out of the proceeds of such land sales at the rate of One hundred and ten (110) per centum of the par value, and accrued interest; and that the bonds so drawn shall cease to bear interest from and after sixty days' public notice of such drawing. Suitable clauses shall be inserted in said mortgages for the enforcement of these provisions by the trustees named in said mortgages.

111

The new general mortgage shall be so framed that such sales of land under the provisions of the new first, or new consolidated mortgage, shall fully release the lands or town lots so sold from any lien or claim of lien of such general mortgage thereon.

The mortgages securing the several classes of bonds hereinbefore provided for shall also contain

provisions authorizing the trustees thereunder to enforce the rights of the bondholders by taking possession, or by suit, after six (6) months' default in the payment of any semi-annual installment of interest, and making the principal of all the bonds immediately due and payable upon such default, at the option of the trustees named in said mortgages respectively, as also at the option of a majority in amount of the bondholders secured by such mortgages respectively.

And generally, such mortgages shall be in such form, and contain such usual and ordinary provisions in other respects as the said trust company shall approve.

146

EIGHTH.—When the said new railway company shall have been organized and the above-mentioned bonds and stocks shall have been received by the said trust company, party of the eighth part hereto, as aforesaid, it shall deliver to the holders of its certificates issued for the first mortgage bonds and coupons so to be deposited as aforesaid, and entitled to participate herein, and in exchange therefor, new first mortgage bonds of like amount, bond for bond, and in addition thereto shall pay the holder of such certificate for each such bond, in cash, the face value (without interest), of the unpaid coupons or portions of coupons appertaining to such bonds deposited by him, up to and including the coupon maturing on July 1, 1887.

147

It shall deliver to the holders of certificates of consolidated bonds and coupons so deposited as aforesaid, and entitled to participate herein, and in exchange therefor, new consolidated bonds of like amount, bond for bond, and also said debenture bonds of the new company, bearing interest at the

rate of six (6) per cent. per annum, for three-fourths of the face value (without interest) of the unpaid coupons appertaining to said bonds deposited by them up to and including the coupon maturing on October 1, 1887, and shall deliver to the trustee of the new general mortgage the One million one hundred and forty-nine thousand Dollars at par value of new consolidated mortgage bonds, subject, however, to the provisions of subdivision 2 of paragraph seventh, of this agreement.

149

It shall deliver to holders of certificates for the general mortgage bonds and coupons deposited as aforesaid, and in exchange therefor, new general mortgage bonds of like amount, bond for bond, and shall also deliver to the holders of such certificates said debenture bonds of the new company, bearing interest at the rate of four (4) per cent. for two-thirds of the face value (without interest) of the unpaid coupons belonging to the existing general mortgage bonds deposited by them to and including the coupon maturing on October 1, 1887.

150

It shall deliver to the Southern Development Company and Morgan's Louisiana and Texas Railroad and Steamship Company eight hundred and eighty of the new general mortgage bonds, upon surrender or cancellation by those companies of the 880 existing bonds now held by them as collateral security as above mentioned, or of the certificates of deposit therefor.

The new bonds so to be received by those companies shall be applied at their par value in payment of those debts and claims which those companies now hold against the present Houston and Texas Central Railway Company and to secure which the said existing eight hundred and eighty bonds have been hypothecated, and shall be taken

in payment for eight hundred and eighty thousand dollars of said debts and claims; and said companies shall upon receipt of said new bonds give to the party of the eighth part hereto an acquittance and satisfaction of the aforesaid amount of their debts and claims and to that extent they shall cease to be entitled to any rights under this agreement as holders of the floating debt of said existing railway company.

In the event that any of the bondholders shall not have assented to this agreement the said Central Trust Company shall deliver the bonds and other benefits which would have been distributed to such bondholders had they assented hereto, to the person or persons who shall have provided the money to make the payment to said non-assenting bondholders as elsewhere herein provided.

152

Scrip bearing interest may be issued for fractional rights in the several classes of debenture bonds convertible into bonds of the corresponding classes respectively.

NINTH.—The said ten million dollars (\$10,000,000) par value of said new stock is to be issued to, and shall be divided *pro rata* among such holders of the floating debt of the said railway company as, within a time to be prescribed by said trust company, may provide a *pro rata* share, proportionate to the whole floating debt of the company, of the cash payments to be made hereunder for interest and bonus to the holders of the first-mortgage bonds and coupons and for the necessary charges, expenses and liabilities incurred, or to be incurred, by the said trust company in carrying out the provisions of this agreement.

153

Provided, however, that the holders of the existing capital stock of the Houston and Texas Cen-

Exhibit A, Attached to Complaint.

154

tral Railway Company may, within a time to be prescribed by said trust company therefor, if they shall elect so to do, provide their *pro rata* share proportionate to the whole outstanding capital of the present company of the amount requisite to discharge the floating debt of the company, and to provide for the cash payments, charges, expenses and liabilities above referred to; and in that event they shall be entitled to receive a like proportionate amount of stock of said reorganized company.

155

The amount of such *pro rata* share to be paid, whether by the holders of the floating indebtedness of said company, or by said stockholders, is to be fixed and determined by said trust company.

156

TENTH.—In the event that any portion of such capital stock shall not be taken up by either the holders of the floating indebtedness of said Houston and Texas Central Railway Company, or by the stockholders thereof, under the provisions in that behalf hereinbefore contained, then, and in that event the Southern Pacific Company or its appointee, upon providing such portion of the cash payments to be made hereunder for interest and bonds to the holders of the first-mortgage bonds and coupons and for the necessary charges, liabilities and expenses incurred by said trust company in carrying out the provisions of this agreement, as shall not have been provided by the floating-debt creditors or stockholders of the said Houston and Texas Central Railway Company hereunder, shall be entitled to the entire balance of stock of the new company not so taken, but in the event that the Southern Pacific Company or its appointee shall not make provision therefor within thirty (30) days after notice to them in writing,

by said trust company, of the amount so remaining unprovided for, then, and in that event, the said trust company shall have power, and it is hereby authorized to sell so much of said stock not so taken, as shall be necessary, and apply the proceeds thereof to the payment of the charges, expenses and liabilities incurred by it in this reorganization and all stocks, securities, moneys and property whatsoever remaining in its hands after the discharge of such charges, expenses and liabilities under this agreement shall be delivered by it to the new company so to be organized.

ELEVENTH.—In case the Southern Pacific Company, or its appointee, shall provide the money for the payment in cash of the proportionate amount of the sum needed for distribution to the non-assenting security holders, it shall be entitled to all the rights, privileges and benefits which would have appertained to any such non-assenting security holders had they elected to become parties to this agreement; but, if after thirty days' notice so to do as above provided, said Southern Pacific Company, or its appointees, shall not provide such money, then the said trust company is hereby authorized to raise moneys by the organization of a syndicate or syndicates for such purpose, or in such other way as such trust company may deem best, and to make all necessary arrangements and agreements for the compensation of such syndicate or syndicates, or person or persons with whom such arrangement may be made.

And the syndicate or syndicates so formed, or other persons furnishing such moneys under agreement with the said trust company, shall be entitled to all the rights, privileges and benefits which

would have appertained to any such non-assenting security holders had they elected to become parties to this agreement.

161

TWELFTH.—The said trust company shall have all the powers necessary to carry out this plan of reorganization effectually. It may do all things necessary for the proper execution and issue of the mortgages, bonds, and debentures above provided for, including voting on the stock of the new company therefor. It may employ counsel, agents and all necessary assistants, and may determine and allow them a reasonable compensation.

It shall also prescribe the form of the new securities and certificates of stock, and shall have power to create all necessary trusts contemplated by this reorganization.

If by reason of legal or other objection any of the provisions of this agreement cannot be strictly performed by said trust company, then said trust company shall conform as nearly as may be to such provisions in the execution of this agreement.

162

The said trust company shall have power to modify the above plan in any matter of detail not directly affecting the ultimate results to the parties to this agreement. It shall give notice of any proposal modification by annexing the same to the original of this agreement and by advertising the substance thereof in at least three daily newspapers published in the City of New York, at least twice a week and during two weeks, and such advertisement shall be considered to have the full effect of personal notice.

All parties who do not express in writing their dissent from such modification and deliver such written dissent to said trust company within two

weeks from the date of the last publication, shall be considered to have assented to such modification.

THIRTEENTH.—The moneys received by the said trust company from earnings in excess of operating expenses, or from receivers, and all proceeds from sales of property other than lands which may come into the possession of said trust company, shall be used and disbursed by the said trust company (unless affected by some other trust or obligation), for the purpose of making such betterments and improvements of the railway and its property, as may be necessary and acquiring necessary rolling stock and equipment; for the settlement and purchase of any claims against or liabilities of the said railway company, having priority over or equities superior to said mortgages, including any and all receivers' certificates which have at any time been or may hereafter be issued, and which said trust company may deem it advisable to settle or purchase; for the expenses of the various foreclosure or other suits; for the expenses, liabilities and compensation of said trust company, and its agents, counsel and employees; and for such other payments as may be required under the decree or decrees of sale or other order of the court in the progress of the various suits.

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165

Any balance remaining on hand after the payment of the charges, expenses and liabilities of said trust company under this reorganization, shall be turned over by it to the new railway company.

FOURTEENTH.—The Southern Pacific Company, party of the seventh part hereto, hereby agrees when called upon by the said trust company so to do, after the organization of the new company

under this agreement, to execute in due form the guarantees upon the several classes of bonds as hereinbefore provided, the manner and form of such guarantees to be prescribed by the said trust company.

167

FIFTEENTH.—The said Central Trust Company shall be allowed a reasonable compensation for its services under this agreement, which sum shall be treated as part of the expenses of this reorganization hereinbefore provided for, to be paid by parties other than the bondholders.

The amounts hereinbefore prescribed to be paid by holders of consolidated mortgage and general mortgage bonds upon deposit of bonds held by them respectively are not to be deemed to be in any wise a part of the costs, expenses and liabilities required to be paid by parties other than the bondholders.

168

SIXTEENTH.—This agreement shall be printed and copies thereof may be signed; and all of said copies so signed shall be deemed and taken as constituting one original paper; and the deposit of securities and certificates shall have the same effect as if the holders thereof had actually subscribed this agreement.

SEVENTEENTH.—If this agreement shall not have been assented to by the holders of at least sixty (60) per cent. in amount of each class of the existing bonds above described, other than those of the Waco and Northwestern division, on or before sixty days from the date hereof, then any depositor may withdraw the bonds deposited by him, provided such withdrawal be made prior to the announcement by the said trust company that a de-

Exhibit A, Attached to Complaint.

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posit of sufficient bonds has been made and that it will proceed to carry out the execution of this plan of reorganization as hereinbefore provided for.

In Witness Whereof the said parties have hereunto set their names or affixed their corporate seals, and have written opposite their names or seals the amount of the bonds held by them and the classes thereof.

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State of New York, }
City of New York, } ss.:
County of New York, }

Henry L. Bogert, one of the plaintiffs above-named, being duly sworn, says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

171

HENRY L. BOGERT,
Executor.

Sworn to before me this
26th day of July, 1913.

WILLIAM DONNELLY,
Notary Public 72,
New York County.

172 Notice of Intention to Petition for Removal.

(Served August 14, 1913, and Filed August 16, 1913.)

Sir:

PLEASE TO TAKE NOTICE that we shall file a petition and bond on removal, of which the annexed are copies, in the office of the Clerk of the County of Queens, on the 16th day of August, 1913.

173 Dated, August 14th, 1913.

Yours, &c.,

JOLINE, LARKIN & RATHBONE,
Attorneys for Defendant appearing specially for the purposes of removal and for no other purpose,

Office and Postoffice Address,
54 Wall Street,
Manhattan,
New York City.

174 To

DITTENHOEFER, GERBER & JAMES, Esqs.,
Attorneys for Complainants,
96 Broadway, New York City.

Petition for Removal of Cause from State Court. 175

(Served August 14, 1913, and Filed August 16, 1913.)

SUPREME COURT,

QUEENS COUNTY.

HENRY L. BOGERT, et al.,
Complainants.

against

SOUTHERN PACIFIC COMPANY,
Defendant.

176

The petitioner, Southern Pacific Company, defendant in the above-entitled action respectfully shows and alleges:

FIRST.—That your petitioner, Southern Pacific Company, now is and at the time of the commencement of this action was a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and a citizen and resident of the State of Kentucky, and is a non-resident of the State of New York and was not at the time of the commencement of this action a citizen or resident of the State of New York or of any other State except as aforesaid.

177

SECOND.—That the plaintiffs herein now are and at the time of the commencement of this action were citizens and residents of the State of New York.

178 *Petition for Removal of Cause from State Court.*

THIRD.—That the amount in dispute in this action exceeds, exclusive of interest, costs and expenses, Three thousand (\$3,000) Dollars.

FOURTH.—That this action is brought by the the plaintiffs as executors of Walter B. Lawrence, deceased, to impress a trust upon certain stock of the Houston & Texas Central Railway Company received by it under an agreement for the reorganization of said company and requiring the defendant to account for all the said stocks, money, property, benefits and advantages so received. That the defendant has a good and sufficient defense herein.

179

FIFTH.—That your petitioner has and presents herewith a good and sufficient surety; that it will within thirty days from the date of filing this petition file in the United States District Court for the Eastern District of New York a certified copy of the record in said suit and paying all costs that may be awarded by the District Court of the United States if said Court shall hold that this action was unlawfully or improperly removed thereto.

180

SIXTH.—That your petitioner has been served with a copy of the summons and complaint in this action, and that the time of the defendant in this action to answer, plead or otherwise move to the complaint has not expired, and that your petitioner has not filed nor served any answer or in any way pleaded to the complaint herein.

WHEREFORE, your petitioner prays that this Honorable Court proceed no further herein except to accept the said surety and bond, and cause the record herein to be removed to the said District

Petition for Removal of Cause from State Court. 181

Court of the United States for the Eastern District
of New York.

Dated, August 13th, 1913.

SOUTHERN PACIFIC COMPANY,

By A. K. Van Deventer,
Treasurer.

JOLINE, LARKIN & RATHBONE,
Solicitors for Petitioner. 182

State of New York, }
County of New York, } ss.:

A. K. Van Deventer, being duly sworn, deposes
and says that he is an officer, to wit: Treasurer of
the Southern Pacific Company, petitioner named
in the foregoing petition; that he has read the said
petition and knows the contents thereof and that
the same is true to the knowledge of deponent ex-
cept as to the matters therein stated to be alleged
upon information and belief and that as to those
matters he believes it to be true. 183

(Seal)

A. K. VAN DEVENTER.

Sworn to before me this
13th day of August, 1913.

FRANCIS L. MADDEN,
Notary Public, Westchester Co.
Certificate filed in New York County.
County Clerk's No. 60.

184

Bond on Removal.

(Filed August 16, 1913.)

(NOTE—The defendant Southern Pacific Company, as principal, and National Surety Company, as surety, duly executed and filed herein on August 16, 1913, their bond in the sum of \$500, conditioned in the form provided by law upon the renewal of such a cause as this from a State to a Federal Court, but which bond is omitted herefrom.)

185

Notice of Filing of Record on Removal.

(Served September 16, 1913.)

Sirs:

PLEASE TO TAKE NOTICE that we have this day filed in the office of the Clerk of the District Court of the United States for the Eastern District of New York a certified copy of the record on removal in the above entitled action.

Dated, New York, September 15, 1913.

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Yours, &c.,

JOLINE, LARKIN & RATHBONE,

Solicitors for Defendant,
Office and Post Office Address,54 Wall Street,
Manhattan,
New York City.

To

Messrs. DITTENHOEFER, GERBER & JAMES,

Solicitors for Complainants,

96 Broadway,
Manhattan,
New York City.

Answer in Federal Court.

187

(Filed October 31, 1913.)

**IN THE DISTRICT COURT OF THE
UNITED STATES,****FOR THE EASTERN DISTRICT OF NEW YORK.**

HENRY L. BOGERT, TOWNSEND
LAWRENCE and ANITA LAW-
RENCE, as Executors under the
Last Will and Testament of
Walter B. Lawrence, deceased,
suing on behalf of themselves
and other stockholders of the
Houston and Texas Central
Railway Company, similarly
situated, who may come in and
contribute to the expenses of
this action,

188

Answer.

Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

189

The defendant, for answer to the bill of complaint herein, respectfully shows to the Court as follows:

I. The defendant admits that at all the times mentioned in the bill of complaint, the defendant was and still is a corporation organized and existing under and by virtue of the laws of the State of Kentucky.

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The defendant admits, upon information and belief, that the Houston and Texas Central Railroad Company (hereinafter for brevity termed the Railroad Company) now is, and ever since its incorporation has been, a corporation organized and existing under and by virtue of the laws of the State of Texas, but it denies, upon information and belief, that said Railroad Company was at all the times mentioned in the bill of complaint a corporation of the State of Texas or of any other State, and alleges, upon information and belief, that the Railroad Company was incorporated under the laws of the State of Texas on or about August 1, 1889.

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The defendant admits, upon information and belief, that at all the times mentioned in the bill of complaint the Houston and Texas Central Railway Company (hereinafter for brevity termed the Railway Company) was a corporation organized and existing under and by virtue of the laws of the State of Texas, and alleges, upon information and belief, that said Railway Company was incorporated under the name of the "Galveston & Red River Railway Company" by a special act of the Legislature of the State of Texas approved March 11, 1848, being Chapter 204 of the Special Laws of the State of Texas for the year 1848; and that by a special act of said Legislature approved September 1, 1856, being Chapter 351 of the Special Laws of the State of Texas for the year 1856, the name of said Company was changed to "The Houston and Texas Central Railway Company"; that neither of the said special acts of the Legislature of the State of Texas contained any limitation upon the period of the corporate existence of the Railway Company, and that the Railway Company,

ever since the year 1848 has been and still is a corporation organized and existing under and by virtue of the laws of the State of Texas.

II. The defendant admits, upon information and belief, the allegations contained in article "Second" of the bill of complaint.

III. The defendant admits, upon information and belief, that the complainants' testator, Walter B. Lawrence, at the time of his death, resided in the County of Queens, State of New York, and was at the time of the alleged transactions and grievances set forth in the bill of complaint, a resident of the State of New York. Except as aforesaid, the defendant is without knowledge of the matters alleged in article "Third" of the bill of complaint and leaves the complainants to make such proof thereof as they may be advised and able to make. 194

IV. The defendant is without knowledge of the matters alleged in article "Fourth" of the bill of complaint and leaves the complainants to make such proof thereof as they may be advised and able to make. 195

V. Except as herein specifically admitted, the defendant denies, upon information and belief, the allegations contained in article "Fifth" of the bill of complaint. The defendant admits and alleges, upon information and belief, that at and prior to the time of the foreclosure sale referred to in the bill of complaint, the Railway Company was entitled to land grants from the State of Texas amounting, exclusive of the roadbed, right of way and lands necessary for the proper operation and maintenance of the railroad, to about 4,500,000

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acres, and it further alleges, upon information and belief, that the Railway Company never received patents for any large amount of said lands, and that the rights and claims of the Railway Company to large portions of its said land grants, as theretofore understood and claimed by it, were disputed by the Attorney General of the State of Texas, and that the Railway Company was not possessed of and did not hold or own said lands or land grants, or any of them, or any lands or land grants whatsoever, at any time subsequent to the foreclosure decree and the sales thereunder and the confirmation thereof hereinafter referred to.

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VI. The defendant admits, upon information and belief, that before the date of the reorganization agreement referred to in the bill of complaint, the Railway Company had executed and delivered seven different mortgages to various trustees to secure seven different issues of bonds, and alleges upon information and belief, that the said mortgages, the trustees thereof and the amount of bonds outstanding thereunder were respectively as follows:

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1. Main Line First Mortgage, dated July 1, 1866, to Shepherd Knapp and David S. Dodge as trustees, securing an issue of seven per cent. bonds due July 1, 1891, of which bonds to the aggregate principal amount of \$5,838,000 were outstanding; Nelson S. Easton and James Rintoul having, prior to the year 1885, succeeded said Shepherd Knapp and David S. Dodge as trustees of said mortgage.

2. Western Division First Mortgage, dated December 21, 1870, to Shepherd Knapp and William Walter Phelps as trustees, securing an issue of

seven per cent. bonds due July 1, 1891, of which bonds to the aggregate principal amount of \$2,226,000 were outstanding; Nelson S. Easton and James Rintoul having, prior to the year 1885, succeeded said Shepherd Knapp and William Walter Phelps as trustees of said mortgage.

3. Waco and Northwestern Division First Mortgage, dated June 16, 1873, to The Farmers' Loan and Trust Company as trustee, securing an issue of seven per cent. bonds, due July 1, 1903, of which bonds to the aggregate principal amount of \$1,144,000 were outstanding. 200

4. Main Line and Western Division Consolidated Mortgage, dated October 1, 1872, to The Farmers' Loan and Trust Company as trustee, securing an issue of eight per cent. bonds, due May 1, 1915, of which bonds to the aggregate principal amount of \$4,585,000 were outstanding, including \$666,000 principal amount of the said bonds held by the trustee of the General Mortgage referred to in paragraph 7 of this article VI.

201

5. Waco and Northwestern Division Consolidated Mortgage, dated May 1, 1875, to The Farmers' Loan and Trust Company as trustee, securing an issue of eight per cent. bonds due May 1, 1915, of which bonds to the aggregate principal amount of \$567,000 were outstanding, including \$84,000 principal amount of said bonds held by the trustees of the Main Line First Mortgage referred to in paragraph 1 of this article VI and \$483,000 principal amount of said bonds held by the trustee of the General Mortgage referred to in paragraph 7 of this article VI.

202

6. Income and Indemnity Mortgage, dated May 7, 1877, to Thomas W. House and Benjamin A. Shepherd as trustees, securing an issue of seven per cent. bonds due May 1, 1887, of which bonds to the aggregate principal amount of \$1,500,000 were outstanding, including \$1,499,000 principal amount of said bonds held by the trustee of the General Mortgage referred to in paragraph 7 of this article VI.

203

7. General Mortgage, dated April 1, 1881, to The Farmers' Loan and Trust Company as trustee, securing an issue of six per cent. bonds due April 1, 1921, of which bonds to the aggregate principal amount of \$4,305,000 were outstanding.

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The defendant denies, upon information and belief, that under each of said seven mortgages, except one, bonds secured respectively by the said mortgages had been issued and were outstanding, and alleges, upon information and belief, that bonds had been issued and were outstanding under each and every of the said seven mortgages to the amounts hereinbefore set forth. The defendant denies, upon information and belief, that all or any of the bonds issued under the Income and Indemnity Mortgage had been called in, retired or cancelled before the date of the reorganization agreement referred to in the bill of complaint, and alleges, upon information and belief, that the \$1,499,000 of the said bonds held by The Farmers' Loan and Trust Company as trustee of said General Mortgage, together with the \$666,000 of Main Line and Western Division Consolidated Mortgage bonds and the \$483,000 of Waco and Northwestern Division Consolidated Mortgage bonds held by the trustee of said General Mortgage as above set forth

had been acquired and were held by said trust company as such trustee in accordance with and subject to the provisions of said General Mortgage, by the terms of which it was provided, among other things, as follows:

"That when any of said prior lien bonds are purchased or taken up by exchange they shall not be cancelled, or the mortgage given to secure the payment thereof discharged, until such time as the trustee herein named has the entire amount of bonds purporting to be secured under any one of the before recited several mortgages * * * [and] that all of the prior lien bonds received in exchange for bonds issued hereunder, except as last above provided, shall be held by the trustee herein named as follows: First. As an additional security for the payment of the principal and interest of the bonds issued under this deed. Second. For the benefit and security of the Houston and Texas Central Railway Company, its successors and assigns";

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and the defendant further alleges, upon information and belief, that all of the said Income and Indemnity Mortgage bonds were never exchanged or tendered or offered for exchange, but that at the times of the foreclosure and sale referred to in the bill of complaint at least one of said bonds still remained outstanding wholly unpaid and unexchanged, and that the Main Line and Western Division Consolidated Mortgage bonds, the Waco and Northwestern Division Consolidated Mortgage bonds and the Income and Indemnity Mortgage bonds against which General Mortgage bonds had

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been exchanged were held by The Farmers' Loan and Trust Company as trustee under said General Mortgage as additional security for the payment of the outstanding General Mortgage bonds. The defendant is without knowledge as to whether one Income and Indemnity Mortgage bond for \$500 or any other amount had been or was lost and leaves the complainants to make such proof thereof as they may be advised and able to make.

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The defendant prays leave to refer to the several mortgages in this answer and in the bill of complaint herein mentioned or referred to or to certified copies thereof, and denies each and every allegation contained in the bill of complaint in respect to the contents, purport and effect of the said mortgages and each of them except so far as upon reference to the said several mortgages or to certified copies thereof said allegations shall be found to be true and correct.

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VII. The defendant admits, upon information and belief, that prior to the year 1883 Morgan's Louisiana and Texas Railroad and Steamship Company, a Louisiana corporation (hereinafter for brevity termed the Morgan Company) owned more than a majority of the outstanding capital stock of the Railway Company, or approximately \$4,000,000 par value of the said stock out of a total issue of \$7,726,900; that in or about the year 1883, the Southern Development Company, a California corporation (hereinafter for brevity the Development Company) acquired a majority of the capital stock of the Morgan Company, and that thereafter and in or about the year 1885, said stock of the Morgan Company was sold and transferred by the Development Company to and acquired by this

defendant. Except as hereinbefore specifically admitted, the defendant denies each and every allegation contained in article "Seventh" of the bill of complaint and leaves the complainants to make such proof thereof as they may be advised and able to make.

VIII. The defendant admits, upon information and belief, that in or after the year 1885, the Railway Company became involved in litigations with its secured and unsecured creditors, and that on or about February 11, 1885, two suits were brought against the Railway Company by the trustees of certain of the mortgages upon part of the property of the Railway Company, and alleges, upon information and belief, that said suits were (1) a suit brought by Nelson S. Easton and James Rintoul, as trustees of the Main Line First Mortgage of the Railway Company, dated July 1, 1866, as complainants against the Railway Company as defendant; and (2) a suit was brought by Nelson S. Easton and James Rintoul, as trustees of the Western Division First Mortgage of the Railway Company, dated December 21, 1870, as complainants against the Railway Company as defendant. The defendant further admits, upon information and belief, that each of said suits was commenced by bill in equity filed in the United States Circuit Court for the Eastern District of Texas; that on or about June 22, 1885, the Railway Company interposed answers to said bills; and that said suits were placed upon the docket of said court and numbered respectively 183 and 184; but the defendant is without knowledge as to whether or not any further proceedings were taken in said suits or either of them for a long period of time thereafter, and

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leaves the complainant to make such proof thereof as they may be advised and able to make. The defendant prays leave to refer to the bills of complaint and answers in said suits or to certified copies thereof for a statement of the contents, purport and effect of the said bills and answers and for the character and purposes of said suits, and denies each and every allegation contained in article "Eighth" of the bill of complaint in respect to the contents, purport and effect of said bills and answers and in respect to the character and purpose of said suits and each of them except so far as upon reference to the said bills of complaint and answers or to certified copies thereof said allegations shall be found to be true and correct.

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IX. The defendant admits, upon information and belief, that on or about February 16, 1885, the Development Company filed a bill of complaint against the Railway Company in the United States Circuit Court for the Eastern District of Texas, and that thereafter and on or about February 20, 1885, an order was made in said suit appointing two individual receivers, to wit: Benjamin G. Clark and Charles Dillingham, of the Railway Company and its property, but the defendant denies, upon information and belief, that said order was made upon the consent of the Railway Company, and prays leave to refer to the said order or to a certified copy thereof for a statement of the terms and provisions of the same. The defendant denies that at the time of the filing of said bill of complaint or of the appointment of said receivers or at any other time a majority of the stock of the Development Company was owned by this defendant, and the defendant further denies that at the time of the appointment

of said receivers or at any other time the Development Company and the Railway Company or either of them was controlled by this defendant.

X. The defendant admits and alleges, upon information and belief, that on or about April 20, 1885, an amended and supplemental bill was filed by the Development Company in the said suit above referred to. The defendant prays leave to refer to the said amended and supplemental bill or to a certified copy thereof for a statement of the contents, purport and effect of the said amended and supplemental bill, and denies each and every allegation contained in article "Tenth" of the bill of complaint herein in respect to the contents, purport and effect of said amended and supplemental bill except so far as upon reference to the same or to a certified copy thereof said allegations shall be found to be true and correct.

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XI. The defendant admits, upon information and belief, that on or about July 7, 1885, the Railway Company filed its answer to the said suit of the Development Company. The defendant prays leave to refer to the said answer or to a certified copy thereof for a statement of the contents, purport and effect of the said answer, and denies each and every allegation contained in article "Eleventh" of the bill of complaint herein in respect to the contents, purport and effect of said answer except so far as upon reference to the said answer or to a certified copy thereof said allegations shall be found to be true and correct.

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XII. The defendant admits, upon information and belief, that on or about March 18, 1885, The

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Farmers' Loan and Trust Company as trustee of one or more of the seven mortgages covering the property of the Railway Company, filed its bill of complaint against the Railway Company in the United States Circuit Court for the Eastern District of Texas. The defendant prays leave to refer to the said bill of complaint or to a certified copy thereof for a statement of the contents, purport and effect of said bill and denies each and every allegation contained in article "Twelfth" of the bill of complaint herein in respect to the contents, purport and effect of said bill or of any of the bills theretofore filed against the Railway Company except so far as upon reference to the said bills or to certified copies thereof said allegations shall be found to be true and correct.

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XIII. The defendant admits, upon information and belief, that on or about June 22, 1885, the Railway Company filed its answer to the said bill of complaint of The Farmers' Loan and Trust Company and that said suit was entered on the docket of the United States Circuit Court for the Eastern District of Texas and numbered 183. The defendant is without knowledge as to whether said suit remained on said docket at issue or as to whether any steps were taken to press the same for trial and leaves the complainants to make such proof thereof as they may be advised and able to make. The defendant prays leave to refer to the said answer or to a certified copy thereof for a statement of the contents, purport and effect of said answer and denies each and every allegation contained in article "Thirteenth" of the bill of complaint herein in respect to the contents, purport or effect of said answer except so far as upon reference to said

answer or to a certified copy thereof said allegations shall be found to be true and correct.

XIV. The defendant, upon information and belief, admits the allegations contained in article "Fourteenth" of the bill of complaint herein.

XV. The defendant admits, upon information and belief, that on or about January 21, 1886, the trustees of two mortgages covering different portions of the property of the Railway Company filed bills in equity in the United States Circuit Court for the Eastern District of Texas demanding the foreclosure of said mortgages, and alleges, upon information and belief, that said suits were (1) a suit brought by Nelson S. Easton and James Rintoul as trustees of the Main Line First Mortgage of the Railway Company, dated July 1, 1866, as complainants, against the Railway Company as defendant; and (2) a suit brought by Nelson S. Easton and James Rintoul as trustees of the Western Division First Mortgage of the Railway Company dated December 21, 1870, as complainants against the Railway Company as defendant. This defendant prays leave to refer to the said two bills of complaint or to certified copies thereof for a statement of the contents, purport and effect of the said bills of complaint and for the character and purpose of said suits, and denies each and every allegation contained in article "Fifteenth" of the bill of complaint herein in respect to the contents, purport and effect of said bills of complaint and each of them and in respect to the character and purpose of said suits and each of them except so far as upon reference to the said bills of complaint or to certified copies thereof said allegations shall be found to be true and correct.

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XVI. The defendant admits, upon information and belief, that the Railway Company interposed answers to the bills of complaint referred to in article "Fifteenth" of the bill of complaint herein, and that said suits were placed upon the docket of the United States Circuit Court for the Eastern District of Texas and numbered respectively 198 and 199. This defendant prays leave to refer to the said answers of the Railway Company or to certified copies thereof for a statement of the contents, purport and effect of the said answers and denies each and every allegation contained in article "Sixteenth" of the bill of complaint herein in respect to the contents, purport and effect of said answers and each of them except so far as upon reference to the said answers or to certified copies thereof said allegations shall be found to be true and correct. This defendant is without knowledge as to whether any effort was made to overcome the defenses interposed by the Railway Company to the said suits, or whether any steps were taken to bring the same to a hearing, and leaves the complainants to make such proof thereof as they may be advised and able to make.

XVII. The defendant admits, upon information and belief, that on or about April 24, 1886, a bill of complaint was filed by The Farmers' Loan and Trust Company as trustee of one of the mortgages covering property of the Railway Company, to wit, the General Mortgage of the Railway Company, dated April 1, 1881, against the Railway Company, in the United States Circuit Court for the Eastern District of Texas, and alleges, upon information and belief, that said suit was placed upon the docket of said court and numbered 201. This defendant

prays leave to refer to the said bill of complaint or to a certified copy thereof for a statement of the contents, purport and effect of said bill, and denies each and every allegation contained in article "Seventeenth" of the bill of complaint herein in respect to the contents, purport and effect of the said bill of complaint, except so far as upon reference to the said bill or to a certified copy thereof said allegations shall be found to be true and correct.

XVIII. The defendant prays leave to refer to the said mortgage to The Farmers' Loan and Trust Company as trustee and to the other mortgages referred to in the bill of complaint herein or to certified copies thereof and denies each and every allegation in article "Eighteenth" or elsewhere in the bill of complaint herein contained in respect to the contents, purport and effect of said mortgages or any of them, except so far as upon reference to said mortgages or to certified copies thereof said allegations shall be found to be true and correct. 230

XIX. The defendant admits, upon information and belief, that on or about September 3, 1886, the Railway Company filed its answer to the said bill of complaint of The Farmers' Loan and Trust Company referred to in article "Seventeenth" of the bill of complaint herein, and that on or about September 9, 1886, the Railway Company filed an amendment to its said answer. This defendant prays leave to refer to the said answer and amendment or to certified copies thereof for a statement of the contents, purport and effect of the said amendment and answer, and denies each and every allegation contained in article "Nineteenth" of the bill of complaint herein in respect to the contents, purport and effect of the said answer and amend- 231

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ment and each of them, except so far as upon reference to the said answer and amendment or to certified copies thereof said allegations shall be found to be true and correct.

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XX. The defendant denies, upon information and belief, that all of the suits affecting the property of the Railway Company were consolidated on May 26, 1886, and alleges, upon information and belief, that the only suits consolidated were the suits numbered 198, 199 and 201, pending against the Railway Company, and that said suits were so consolidated by an order of the United States Circuit Court for the Eastern District of Texas, filed on or about May 26, 1886, to which said order or to a certified copy thereof this defendant prays leave to refer. The defendant admits, upon information and belief, that said consolidated cause was numbered 198 upon the docket of said Court. It admits, upon information and belief, that said order of May 26, 1885, appointed Nelson S. Easton, James Rintoul and Charles Dillingham receivers in said consolidated cause of the Railway Company and its property, and that said order directed Benjamin G. Clark and Charles Dillingham, the receivers theretofore appointed in the suit brought by the Development Company, to turn over the property held by them to the receivers in said consolidated cause; but this defendant is without knowledge as to whether said receivers appointed in the suit of the Development Company were appointed by consent or whether said receivers were discharged on May 27, 1886, and leaves the complainants to make such proof thereof as they may be advised and able to make.

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[XXI. The defendant admits, upon information and belief, that various pleadings were filed in said consolidated cause No. 198 by various parties thereto and that various defenses were interposed by the answers of the Railway Company. Answering the allegations of the bill of complaint as to the contents, purport and effect of said pleadings and answers it prays to refer to the said pleadings and answers or to certified copies thereof, and denies each and every allegation in the bill of complaint contained in respect to the contents, purport and effect of the said pleadings and answers except so far as upon reference to said pleadings and answers or to certified copies thereof said allegations shall be found to be true and correct. The defendant denies, upon information and belief, that the defenses interposed by the Railway Company were never overcome in said litigation. It is without knowledge as to whether said defenses or any of them were valid or legal defenses to said suits or any of them or whether they could not be overcome save by the consent of the Railway Company or otherwise, and leaves the complainants to make such proof thereof as they may be advised and able to make. The defendant denies that throughout all or any of the period referred to in article "Twenty-first" of the bill of complaint herein the Railway Company was controlled by this defendant. Except as hereinbefore admitted and denied, the defendant is without knowledge as to any of the matters and things alleged in article "Twenty-first" of the bill of complaint and leaves the complainants to make such proof thereof as they may be advised and able to make. 236

XXII. The defendant admits that thereafter a reorganization agreement dated December 20, 1887, 237

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was entered into of which the agreement annexed to the bill of complaint herein and marked "Exhibit A" is a substantially correct copy, but the defendant denies that the said Exhibit A is in all respects a true and correct copy of the said agreement and for greater certainty prays leave to refer to the original of said agreement to be produced upon the trial of this suit. The defendant admits that said agreement was executed by it and by Central Trust Company of New York and by the holders of a large number of bonds under certain of the mortgages of the Railway Company, and alleges, upon information and belief, that the complainants' testator never executed said agreement or became or was a party to the same. Except as hereinbefore admitted, the defendant denies, upon information and belief, the allegations contained in article "Twenty-second" of the bill of complaint herein.

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XXIII. The defendant denies each and every allegation contained in article "Twenty-third" of the bill of complaint except so far as by reference to the said reorganization agreement said allegations shall be found to be true and correct.

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XXIV. The defendant admits, upon information and belief, that the reorganization contemplated by said reorganization agreement was thereafter carried out, and denies, upon information and belief, that said agreement was not carried out in its provisions concerning the lands owned by the Railway Company. The defendant admits that on or about April 30, May 1, May 2 and May 3, 1888, various new pleadings and answers were filed in the United States Circuit Court for the Eastern District of Texas, and that on or about May 4 a

decree of foreclosure was filed therein. The defendant prays leave to refer to the said pleadings, answers and decree and to the record in said suit or to certified copies thereof for the steps and proceedings taken therein and denies each and every allegation contained in article "Twenty-fourth" of the bill of complaint herein in respect to the contents, purport or effect of said pleadings, answers and decree and in respect to the proceedings in said suit except so far as upon reference to the said pleadings, answers and decree and to the said record or to certified copies thereof said allegations shall be found to be true and correct.

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XXV. The defendant denies the allegations contained in article "Twenty-fifth" of the bill of complaint.

XXVI. The defendant admits, upon information and belief, that pursuant to the decree of May 4, 1888, above referred to, a foreclosure sale of the property of the Railway Company was held, at which part of the property of said Railway Company, including certain of the lands of said Company, was bid in by Frederic P. Olcott, the then president of Central Trust Company of New York, acting for said trust company in pursuance of the reorganization agreement. The defendant denies, upon information and belief, that all of the property of the Railway Company was bid in by the said Olcott at said sale. The defendant admits, upon information and belief, so much of article "Twenty-sixth" of the bill of complaint as alleges as follows:

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"No part of the money or bonds paid, delivered or surrendered at the said sale, for the

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property, bid in by the said Olcott, belonged to him, but said money and bonds were furnished under and pursuant to the said Reorganization Agreement. At said foreclosure sale, the said Olcott also bought in all the said lands owned by the said Railway Company pursuant to said Reorganization Agreement. A new railroad corporation was organized pursuant to the terms of the Reorganization Agreement which was known as the Houston and Texas Central Railroad Company. To said new Company the said Olcott transferred the lines of railroad, rolling stock, etc., purchased at said foreclosure sale. The said Railroad Company thereupon executed bonds secured by three mortgages prepared, executed and delivered in accordance with the Reorganization Agreement, which bonds were delivered to the Central Trust Company and by it distributed among the bondholders who had deposited their Bonds with said Trust Company under the Reorganization Agreement."

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216 The defendant is without knowledge as to whether all of the bondholders of the Railway Company accepted new bonds of the Railroad Company, according to the provisions of the reorganization agreement or otherwise, and leaves complainants to make such proof thereof as they may be advised and able to make. The defendant admits, upon information and belief, that the lands purchased by said Olcott were transferred to certain trust companies, but the defendant denies, upon information and belief, that the said lands or any of them were transferred to the said trust companies for the benefit or use of the Railroad Company, and prays

leave to refer to the instruments transferring the said lands to the said trust companies or to certified copies thereof for a statement of the contents, purport and effect of the said instruments and each of them.

XXVII. The defendant denies each and every allegation contained in article "Twenty-seventh" of the bill of complaint except that it admits that certificates representing all of the \$10,000,000 par value of capital stock of the Railroad Company except directors' qualifying shares were delivered to and acquired by this defendant in the City and State of New York, and that this defendant now holds and owns and claims to own and hold the same; and the defendant alleges that its said acquisition and ownership of the said stock was and is in all respects lawful and proper.

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XXVIII. The defendant admits and alleges that in order to acquire, and as part of the consideration for its acquisition of, said stock of the Railway Company, this defendant undertook to and did guarantee certain obligations of the Railroad Company, and that as required under the reorganization agreement it did pay certain expenses and charges of reorganization, amounting to upwards of \$2,500,000. The defendant admits that it has never been called upon to pay any sum on account of its said guarantees.

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XXIX. The defendant denies each and every allegation contained in article "Twenty-ninth" of the bill of complaint.

XXX. The defendant admits, upon information and belief, the allegations contained in article "Thirtieth" of the bill of complaint.

XXXI. The defendant is without knowledge of the matters alleged in article "Thirty-first" of the bill of complaint and leaves the complainants to make such proof thereof as they may be advised and able to make.

XXXII. The defendant denies, upon information and belief, the matters alleged in article "Thirty-second" of the bill of complaint.

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XXXIII. The defendant denies, upon information and belief, each and every allegation contained in article "Thirty-third" of the bill of complaint, except that it admits that the directors of the Railway Company have not brought or caused to be brought any action against this defendant.

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XXXIV. The defendant, upon information and belief, denies the allegations contained in article "Thirty-fourth" of the bill of complaint except that it admits and alleges, upon information and belief, that in or about the year 1888 an action was brought in the Supreme Court of the State of New York, in and for the County of New York, by Michael Gernsheim, Eugene A. Loeb and Albert Loeb, suing on behalf of themselves and such other stockholders of the Railway Company similarly situated who might come in and contribute to the expense of said action, as plaintiffs, against this defendant and the Railway Company and others as defendants, and that thereafter various proceedings were had in said action resulting in favor of the defendants therein, but for greater certainty this defendant prays leave to refer to the record in said action or to a certified copy thereof for a statement of the several proceedings therein.

XXXV. The defendant, upon information and belief, denies the allegations contained in article "Thirty-fifth" of the bill of complaint except that it admits and alleges, upon information and belief, that in or about the month of August, 1890, an action was brought in the Supreme Court of the State of New York, in and for the County of New York, by Michael Gernsheim, Eugene A. Loeb and Albert Loeb, suing on behalf of themselves and such other stockholders of the Railway Company similarly situated who might come in and contribute to the expenses of said action, as plaintiffs, against this defendant and the Railway Company and others as defendants, and that thereafter various proceedings were had in said action resulting in favor of the defendants therein, but for greater certainty this defendant prays leave to refer to the record in said action or to a certified copy thereof for a statement of the several proceedings therein.

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XXXVI. The defendant admits and alleges, upon information and belief, that in or about the month of August, 1891, an action was brought in the Supreme Court of the State of New York, in and for the County of New York, by Cornelius MacArdell, suing on behalf of himself and such other stockholders of the Railway Company similarly situated who might come in and contribute to the expenses of said action, as plaintiff, against this defendant and the Railway Company and others as defendants. The defendant prays leave to refer to the complaint in said action or to a certified copy thereof for a statement of the contents, purport and effect of said complaint and of the relief therein demanded, and denies each and every allegation contained in article "Thirty-sixth" of the bill of complaint herein

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in respect to the contents, purport and effect of the complaint in the action brought by the said MacArdell or in respect to the relief therein demanded except so far as upon reference to said complaint said allegations shall be found to be true and correct. The defendant is without knowledge as to whether the said MacArdell was a member of the committee of stockholders referred to in the bill of complaint herein or of any committee of stockholders of the Railway Company or whether any such committee ever in fact existed or exists or whether said action was brought in the interest of any such committee or of any committee, and leaves the complainants to make such proof as to said matters as they may be advised and able to make. The defendant admits that said action was brought by the said MacArdell on behalf of himself and of other stockholders of the Railway Company similarly situated, and alleges, upon information and belief, that neither the complainants' testator nor any other stockholders of the Railway Company ever intervened or sought to intervene as a party plaintiff in said action except that in or about the month of March, 1901, the said action having then been pending for nearly ten years without having been brought to trial, a motion was made in said action by one Warren S. Sillcocks, claiming to be a stockholder of the Railway Company, for leave to intervene as a party plaintiff in said action, which said motion was denied on the ground of *laches*.

XXXVII. The defendant admits and alleges that said action brought by the said MacArdell was tried in March, 1902, at Special Term of the New York Supreme Court in and for the

County of New York, but it denies that said action was brought on for trial in due course, and alleges that the trial of said action was unreasonably and unduly delayed by the plaintiff therein, and that said action was not brought on for trial for more than ten years after the same had been begun. The defendant admits that thereafter various proceedings were had in said action, substantially as alleged in article "Thirty-seventh" of the bill of complaint herein, resulting in a judgment in favor of the defendants in said action, but for greater certainty this defendant prays leave to refer to the record in said action or to a certified copy thereof and denies each and every allegation contained in article "Thirty-seventh" of the bill of complaint herein in respect to the proceedings in said action except so far as upon reference to the record in said action or to a certified copy thereof said allegations shall be found to be true and correct.

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XXXVIII. The defendant admits that in or about the month of February, 1908, an action was brought by Walter B. Lawrence, the complainants' testator, suing on behalf of himself and such other stockholders of the Railway Company similarly situated who might come in and contribute to the expenses of said action, as plaintiff, against this defendant and others as defendants. The defendant prays leave to refer to the complaint in said action or to a certified copy thereof for a statement of the contents, purport and effect of said complaint and of the relief therein demanded, and denies each and every allegation contained in article "Thirty-eighth" of the bill of complaint herein in respect to the contents, pur-

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port and effect of the complaint in the action brought by the said Lawrence or in respect to the relief therein demanded except so far as upon reference to said complaint or to a certified copy thereof said allegations shall be found to be true and correct. The defendant is without knowledge as to whether the said Lawrence was a member of the committee of stockholders referred to in the bill of complaint herein or of any committee of stockholders of the Railway Company or whether any such committee ever in fact existed or exists, and leaves the complainants to make such proof thereof as they may be advised and able to make. The defendant admits that various proceedings were had in said action brought by the said Lawrence, substantially as alleged in article "Thirty-eighth" of the bill of complaint herein, resulting in a judgment in favor of the defendants in said action, but for greater certainty this defendant prays leave to refer to the record in said action and denies each and every allegation contained in article "Thirty-eighth" of the bill of complaint herein in respect to the proceedings in said action except so far as upon reference to the record in said action or to a certified copy thereof said allegations shall be found to be true and correct.

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XXXIX. The defendant is without knowledge of any of the matters alleged in article "Thirtieth" of the bill of complaint herein, and leaves the complainants to make such proof thereof as they may be advised and able to make.

XL. The defendant denies, upon information and belief, each and every allegation contained in

the bill of complaint herein not hereinbefore admitted or denied.

Further answering the bill of complaint herein, the defendant respectfully shows to the Court as follows:

AS AND FOR A FIRST, SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT ALLEGES UPON INFORMATION AND BELIEF:

XLI. That the Railway Company is a corporation organized and existing under the laws of the State of Texas, and is an indispensable party to this suit; that said Railway Company is not a party plaintiff or defendant herein, and that there is a defect of parties herein in that the said Railway Company is not a party plaintiff or defendant to this suit. 266

AS AND FOR A SECOND, SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT ALLEGES:

XLII. That all of the matters and things alleged in the bill of complaint herein in respect to the alleged cause of action in said bill of complaint attempted to be set forth happened and occurred in and prior to the year 1888 and that the present suit was not brought until on or about July 28, 1913, more than twenty-five years after the said alleged cause of action had occurred. That at all times since the said alleged cause of action attempted to be set forth in the bill of complaint herein accrued the defendant has maintained in the State of New York an office for the transaction of its business; that at all the said times one or more of 267

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the executive officers of this defendant has been present within the State of New York, engaged upon the business of this defendant; and that at all the said times this defendant and its executive officers have been subject to suit and the service of process in the State of New York in the State and Federal Courts of said State.

AS AND FOR A THIRD, SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT ALLEGES:

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XLIII. That all of the matters and things alleged in the bill of complaint herein in respect to the alleged cause of action in said bill of complaint attempted to be set forth happened and occurred in and prior to the year 1888. That at all times since the said alleged cause of action attempted to be set forth in the bill of complaint herein accrued the defendant has maintained in the State of New York an office for the transaction of its business; that at all the said times one or more of the executive officers of this defendant has been present within the State of New York, engaged upon the business of this defendant; and that at all the said times this defendant and its executive officers have been subject to suit and the service of process in the State of New York in the State and Federal Courts of said State. Upon information and belief, that, as appears from the bill of complaint herein, the complainant's testator, at all times from the date of the matters complained of as a basis for the alleged cause of action in the bill of complaint herein attempted to be set forth, had notice of all of the said matters, but that no action, suit or proceeding, at law or in equity, was brought, instituted

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or begun by the complainants' testator against this defendant either in the State of New York or elsewhere by reason of said matters or any of them until the year 1908, or twenty years after the complainants' testator's alleged cause of action had accrued, when the suit referred to in article "Thirty-eighth" of the bill of complaint herein was begun; and that the present suit was not brought until on or about July 28, 1913, more than twenty-five years after the said alleged cause of action had accrued.

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AS AND FOR A FOURTH, SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT ALLEGES:

XLIV. That all of the matters and things alleged in the bill of complaint herein in respect to the alleged cause of action in said bill of complaint attempted to be set forth happened and occurred in and prior to the year 1888. That at all times since the said alleged cause of action attempted to be set forth in the bill of complaint herein accrued the defendant has maintained in the State of New York an office for the transaction of its business; that at all the said times one or more of the executive officers of this defendant has been present within the State of New York, engaged upon the business of this defendant; and that at all the said times this defendant and its executive officers have been subject to suit and the service of process in the State of New York in the State and Federal Courts of said State. Upon information and belief, that, as appears from the bill of complaint herein, the complainants' testator, at all times from the date of the matters complained of as a basis for the alleged cause of action in the bill of complaint herein attempted to

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be set forth, was chargeable with notice of all of the said matters, but that no action, suit or proceeding, at law or in equity, was brought, instituted or begun by the complainants' testator against this defendant either in the State of New York or elsewhere by reason of said matters or any of them until the year 1908, or twenty years after the complainants' testator's alleged cause of action had accrued, when the suit referred to in article "Thirty-eighth" of the bill of complaint herein was begun; and that the present suit was not brought until on or about July 28, 1913, more than twenty-five years after the said alleged cause of action had accrued.

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AS AND FOR A FIFTH, SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT ALLEGES:

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XLV. That all of the matters and things alleged in the bill of complaint herein in respect to the alleged cause of action in said bill of complaint attempted to be set forth happened and occurred in and prior to the year 1888. That at all times since the said alleged cause of action attempted to be set forth in the bill of complaint herein accrued the defendant has maintained in the State of New York an office for the transaction of its business; that at all the said times one or more of the executive officers of this defendant has been present within the State of New York, engaged upon the business of this defendant; and that at all the said times this defendant and its executive officers have been subject to suit and the service of process in the State of New York in the State and Federal Courts of said State. Upon information and belief, that, as appears from the bill of complaint herein, the complainants' testator, at all times from

the date of the matters complained of as a basis for the alleged cause of action in the bill of complaint herein attempted to be set forth, had notice of all of the said matters, but that no action, suit or proceeding at law or in equity, was brought, instituted or begun by the complainants' testator against this defendant either in the State of New York or elsewhere by reason of said matters or any of them until the year 1908, or twenty years after the complainants' testator's alleged cause of action had accrued, when the suit referred to in article "Thirty-eight" of the bill of complaint herein was begun; and that the present action was not brought until on or about July 28, 1913, more than twenty-five years after the said alleged cause of action had accrued. That between the time of the happening of the matters and things alleged in the bill of complaint herein in respect to the alleged cause of action in said bill of complaint attempted to be set forth and the time of the institution of this suit, many of the persons who were familiar with the said matters and things, and whose testimony would have been available to this defendant upon the trial of this suit in defense of the alleged cause of action herein attempted to be set forth in this suit had been begun diligently and promptly, have died and their testimony is no longer available to this defendant; that during the period of twenty-five years between the time of the happening of the said matters alleged in the bill of complaint herein and the time of the institution of this suit much of the documentary evidence which would have been available to this defendant upon the trial of this suit in defense of the alleged cause of action herein attempted to be set forth herein if this suit had been begun diligently and promptly,

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has been lost and destroyed and has been rendered unavailable to this defendant through the death of the persons familiar with said evidence and by whom the same could have been produced and proved upon the trial of this suit; that by reason of the premises and of the long and unwarrantable delay for a period of twenty-five years in instituting this suit this defendant will be seriously prejudiced and handicapped upon the trial of this suit, and that it will be inequitable and unjust to require this defendant to defend this suit on its merits after the lapse of so long a period of time. That this defendant through its proper officers, has fully and fairly stated the case in this suit to its solicitors herein, and that it has a good and substantial defense upon the merits thereof as this defendant is advised by its said solicitors and verily believes to be true.

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AS AND FOR A SIXTH, SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT ALLEGES:

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XLVI. That all of the matters and things alleged in the bill of complaint herein in respect to the alleged cause of action in said bill of complaint attempted to be set forth happened and occurred in and prior to the year 1888. That at all times since the said alleged cause of action attempted to be set forth in the bill of complaint herein accrued the defendant has maintained in the State of New York an office for the transaction of its business; that at all the said times one or more of the executive officers of this defendant has been present within the State of New York, engaged upon the business of this defendant; and that at all the said times this defendant and its executive officers have

been subject to suit and the service of process in the State of New York in the State and Federal Courts of said State. Upon information and belief, that, as appears from the bill of complaint herein, the complainants' testator, at all times from the date of the matters complained of as a basis for the alleged cause of action in the bill of complaint herein attempted to be set forth, was chargeable with notice of all of the said matters, but that no action, suit or proceeding, at law or in equity, was brought, instituted or begun by the complainants' testator against this defendant either in the State of New York or elsewhere by reason of said matters or any of them until the year 1908, or twenty years after the complainants' testator's alleged cause of action had accrued, when the suit referred to in article "Thirty-eighth" of the bill of complaint herein was begun; and that the present action was not brought until on or about July 28, 1913, more than twenty-five years after the said alleged cause of action had accrued. That between the time of the happening of the matters and things alleged in the bill of complaint herein in respect to the alleged cause of action in said bill of complaint attempted to be set forth and the time of the institution of this suit, many of the persons who were familiar with the said matters and things, and whose testimony would have been available to this defendant upon the trial of this suit in defense of the alleged cause of action herein attempted to be set forth if this suit had been begun diligently and promptly, have died and their testimony is no longer available to this defendant; that during the period of twenty-five years between the time of the happening of the said matters alleged in the bill

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of complaint herein and the time of the institution of this suit much of the documentary evidence which would have been available to this defendant upon the trial of this suit in defense of the alleged cause of action herein attempted to be set forth herein if this suit had been begun diligently and promptly, has been lost and destroyed and has been rendered unavailable to this defendant through the death of the persons familiar with said evidence and by whom the same could have been produced and proved upon the trial of this suit; that by reason of the premises and of the long and unwarrantable delay for a period of twenty-five years in instituting this suit this defendant will be seriously prejudiced and handicapped upon the trial of this suit, and that it will be inequitable and unjust to require this defendant to defend this suit on its merits after the lapse of so long a period of time. That this defendant through its proper officers, has fully and fairly stated the case in this suit to its solicitors herein, and that it has a good and substantial defense upon the merits thereof as this defendant is advised by its said solicitors and verily believes to be true.

AS AND FOR A SEVENTH, SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT ALLEGES UPON INFORMATION AND BELIEF:

XLVII. That during all or some of the said years 1881, 1882, 1883 and 1884, a majority of the outstanding capital stock of the Railway Company was owned by the Morgan Company and a majority of the outstanding capital stock of the Morgan Company was owned by the Development Company; and that during the year 1885 the defendant acquired from the Development Company the stock

of the Morgan Company theretofore owned by the Development Company. That the facts in respect to the relations between the Railway Company, the Morgan Company, the Development Company and this defendant were as follows and not otherwise: The late Charles Morgan having become, in or about the year 1877, the owner of a majority of the capital stock of the Railway Company, afterwards and shortly before the time of his death transferred such majority of said capital stock of the Railway Company to the Morgan Company, which had been formed for the purpose of acquiring various important railroad and steamship properties theretofore owned by said Morgan individually. Some years after the death of said Morgan and in the spring of the year 1883, a contract was made between the Development Company and the executrix of the estate of and the legatees of said Morgan for the purchase by the Development Company of upwards of a majority of the capital stock of the Morgan Company. Said contract was carried out by the parties thereto and the Development Company acquired thereunder in the years 1883 and 1884 a majority of the capital stock of the Morgan Company, this stock being afterwards transferred by the Development Company to and acquired by this defendant. The controlling inducement for the acquisition of said stock of the Morgan Company by the Development Company and by this defendant was the fact that the Morgan Company was the owner of an important line of steamships between New York, New Orleans, Galveston and other ports, and of important railroad properties other than the Railway Company, in which the Development Company and the defendant were interested, and the fact that

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the Morgan Company owned a majority of the stock of the Railway Company formed but an unimportant and wholly collateral inducement to the Development Company and to this defendant for the acquisition of the stock of the Morgan Company.

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XLVIII. Upon information and belief, that during each of the years 1881, 1882, 1883 and 1884, the earnings and income of the Railway Company were much less than the amount required to pay its operating expenses, taxes and fixed charges, the amount of such deficiency in each of said years and the total amount thereof being as follows:

1881	\$670,836.51
1882	430,177.16
1883	570,979.25
1884	991,481.44
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Total	\$2,663,474.36

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That during the said years 1881, 1882, 1883 and 1884, the Railway Company incurred a large floating indebtedness of upwards of \$3,000,000, including large amounts advanced to and for the benefit of the Railway Company at its request by the Morgan Company and the Development Company for the purpose of enabling the Railway Company to pay its maturing obligation and to prevent the foreclosure of the mortgages theretofore executed and delivered by it to secure the several issues of bonds hereinbefore referred to.

XLIX. That thereafter default having been made by the Railway Company in the payment of the interest upon the bonds of the Railway Com-

pany theretofore issued and then outstanding and in the observance and performance of the covenants and agreements contained in the several mortgages of the Railway Company securing the said issues of bonds on the part of the Railway Company to be observed and performed, and the efforts of the Morgan Company and of the Development Company to prevent the foreclosure of the said several mortgages of the Railway Company having proved unsuccessful, various suits were instituted against the Railway Company in the United States Circuit Court for the Eastern District of Texas for the foreclosure of the said mortgages of the Railway Company, and that certain of said suits were consolidated under the title of "Nelson S. Easton and James Rintoul, Trustees, and The Farmers' Loan and Trust Company Trustee, vs. The Houston and Texas Central Railway Company" and others, said consolidated cause being placed upon the docket of said United States Circuit Court for the Eastern District of Texas as "Consolidated Cause No. 198."

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L. That thereafter various proceedings were had in said Consolidated Cause No. 198, and that on or about May 4, 1888, a decree of foreclosure and sale was duly made and entered therein, wherein and whereby it was adjudged and decreed among other things as follows:

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1. That there were outstanding and entitled to the security of the Main Line First Mortgage of the Railway Company, dated July 1, 1866, bonds to the aggregate principal amount of \$5,838,000; and that there was due and payable by the Railway Company upon all of the said bonds the principal amount thereof, with interest thereon at the rate

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of seven per cent. per annum from January 1, 1888, and also the installments of interest on the said bonds at the rate of seven per cent. per annum due January 1, 1886, and also on the first day of each July and January since said date, with interest upon each installment of interest since the date when the same became due and payable at the rate of six per cent. per annum.

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2. That there were outstanding and entitled to the security of the Western Division First Mortgage of the Railway Company, dated December 21, 1870, bonds to the aggregate principal amount of \$2,226,000; and that there was due and payable by the Railway Company upon all of the said bonds the principal amount thereof, with interest at the rate of seven per cent. per annum from January 1, 1888, and also the installments of interest on the said bonds at the rate of seven per cent. per annum due January 1, 1886, and also on the first day of each July and January since said date, with interest upon each installment of interest since the date when the same became due and payable at the rate of six per cent. per annum.

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3. That there were outstanding and entitled to the security of the Main Line and Western Division Consolidated Mortgage of the Railway Company, dated October 1, 1872, bonds to the aggregate principal amount of \$4,585,000, of which \$666,000 were held by the trustee of the General Mortgage of the Railway Company; and that there was due and payable by the Railway Company upon all of the said bonds the principal amount thereof with interest at the rate of eight per cent. per annum from April 1, 1888, and also the installments of interest on the said bonds at the rate of eight per cent. per

annum due April 1, 1885, and also on the first day of each October and April since said date with interest upon each installment of interest since the date when the same became due and payable at the rate of six per cent. per annum.

4. That there were outstanding and entitled to the security of the Waco and Northwestern Division Consolidated Mortgage of the Railway Company, dated May 1, 1875, bonds to the aggregate principal amount of \$567,000, of which \$84,000 were held by the trustees of the Main Line First Mortgage of the Railway Company and \$483,000 by the trustee of the General Mortgage of the Railway Company; and that there was due and payable by the Railway Company upon all of the said bonds the principal amount thereof, with interest at the rate of eight per cent. per annum from May 1, 1888, and also the installments of interest on the said bonds at the rate of eight per cent. per annum due November 1, 1881, and also on the first day of each May and November since said date, with interest upon each installment of interest since the date when the same became due and payable at the rate of six per cent. per annum. 302 303

5. That there were outstanding and entitled to the security of the Income and Indemnity Mortgage of the Railway Company dated May 7, 1877, bonds to the aggregate principal amount of \$1,500,000, of which \$1,499,000 were held by the trustee of the General Mortgage of the Railway Company; and that there was due and payable by the Railway Company upon all of the said bonds the principal amount thereof, with interest at the rate of seven per cent. per annum from May 1, 1887, and also the installments of interest on the said bonds at the rate of seven per cent. per annum due November 1,

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1881, and also on the first day of each May and November since said date with interest upon each installment of interest since the date when the same became due and payable at the rate of eight per cent. per annum.

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6. That there were outstanding and entitled to the security of the General Mortgage of the Railway Company, dated April 1, 1881, bonds to the aggregate principal amount of \$4,305,000; and that there was due and payable by the Railway Company upon all of the said bonds the principal amount thereof, with interest at the rate of six per cent. per annum from April 1, 1888, and also the installments of interest on the said bonds at the rate of six per cent. per annum due April 1, 1885, and also on the first day of each October and April since said date with interest upon each installment of interest since the date when the same became due and payable at the rate of six per cent. per annum, less whatever sums might be received by the trustee of said General Mortgage as the holder of bonds under the Main Line and Western Division Consolidated Mortgage and under the Income and Indemnity Mortgage of the Railway Company.

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7. That the Railway Company was insolvent.

8. That the Railway should, on or before the expiration of thirty days from the date of said decree pay into court the sums therein adjudged and decreed to be due and payable by it and that in default of such payment all equity of redemption of the Railway Company and of persons or parties claiming under it since the execution of the mortgages above referred to and of all the parties to said suit and all holders of bonds issued under said

mortgages or any of them or of the coupons appertaining thereto, of, in and to the said mortgaged premises, property, rights, assets and franchises, and every part and parcel thereof described or embraced in the said mortgages or any of them, should be barred and foreclosed; and that in default of such payment all of the said mortgaged premises and property, real, personal or mixed, rights, privileges, immunities and franchises should be sold in the manner and upon the terms provided in said decree.

The defendant prays leave to refer to the said decree or to a certified copy thereof for a full and complete statement of the contents, purport and effect of the said decree.

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LI. That at the time of the entry of said decree the United States Circuit Court for the Eastern District of Texas had full and complete jurisdiction of the parties to said Consolidated Cause No. 198, including the Railway Company which was at all times a party defendant therein, and that at the time of the entry of said decree said United States Circuit Court had full and complete jurisdiction of the subject-matter of said Consolidated Cause; and that said decree and all the provisions thereof ever since the date of the entry of said decree have been and still are in full force and effect and binding and conclusive upon the Railway Company and its stockholders, including the complainants in this suit and their testator.

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LII. That no part of the sums adjudged and decreed to be due and payable by the Railway Company as provided in said decree of foreclosure and sale was paid by the Railway Company or by any

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other person, firm or corporation on its behalf on or before the expiration of thirty days from the date of said decree or at any other time, and that by reason of such failure to pay said sum and of the provisions of said decree, the Railway Company and its stockholders, including the complainants in this suit and their testator, were and still are barred and foreclosed from any and all right, title, interest, estate or equity of redemption of, in and to any of the mortgaged premises, property, rights, assets and franchises of the Railway Company.

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LIII. That on or about September 8, 1888, in accordance with the provisions of said decree of foreclosure and sale, all of the property of the Railway Company, consisting of the premises, property, rights, assets and franchises subject to the several mortgages of the Railway Company, was duly offered for sale and sold at the front door of the United States Post Office Building in the City of Galveston, County of Galveston, State of Texas, in two parcels, namely:

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1. Parcel consisting of the property covered by the Waco and Northwestern Division First Mortgage (subject, however, to said mortgage) to George E. Downs for \$25,000.

2. All the residue of the property of the Railway Company to Frederic P. Olcott for \$10,580,000.

That said sale was duly confirmed by order of the United States Circuit Court for the Eastern District of Texas, duly made and entered on or about December 4, 1888, and that the properties purchased by said Olcott were duly conveyed to him by deed dated January 18, 1889, and executed by the

Special Master Commissioner appointed to make such sale and by the trustees of the several foreclosed mortgages and by the Railway Company.

LIV. That at the date of the said decree of foreclosure and sale the amount due for principal and interest upon the bonds of the Railway Company secured by the mortgages foreclosed by said decree and outstanding in the hands of the public (excluding [a] the principal and interest on such of the bonds of the Railway Company as were held as collateral security by the trustees of the Main Line First Mortgage and of the General Mortgage; and [b] the principal and interest of the Income and Indemnity Mortgage bonds of the Railway Company, all but \$1,000 principal amount of which were held as collateral security by the trustee of the General Mortgage of the Railway Company), was as follows:

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1. Principal of Main Line First Mortgage Bonds	\$5,838,000.00	
2. Interest thereon at 7% from January 1, 1888, to May 4, 1888.	139,625.69	315
3. Installment of interest due on said bonds January 1, 1886 (3½%)	204,330.00	
4. Interest thereon at 6% from January 1, 1886, to May 4, 1888.	28,708.36	
5. Installment of interest due on said bonds July 1, 1886 (3½%)	204,330.00	
6. Interest thereon at 6% from July 1, 1886, to May 4, 1888.....	22,578.46	
7. Installment of interest due on said bonds January 1, 1887 (3½%)	204,330.00	

	8.	Interest thereon at 6% from January 1, 1887, to May 4, 1888.	16,448.56
	9.	Installment of interest due on said bonds July 1, 1887 (3½%)	204,330.00
	10.	Interest thereon at 6% from July 1, 1887, to May 4, 1888.	10,318.66
	11.	Installment of interest due on said bonds January 1, 1888 (3½%)	204,330.00
317	12.	Interest thereon at 6% from January 1, 1888 to May 4, 1888.	4,188.76
	13.	Principal of Western Division First Mortgage Bonds.....	2,226,000.00
	14.	Interest thereon at 7% from January 1, 1888 to May 4, 1888.	53,238.57
	15.	Installment of interest due on said bonds January 1, 1886 (3½%)	77,910.00
	16.	Interest thereon at 6% from January 1, 1886 to May 4, 1888.	10,946.35
	17.	Installment of interest due on said bonds July 1, 1886 (3½%)	77,910.00
318	18.	Interest thereon at 6% from July 1, 1886 to May 4, 1888..	8,609.05
	19.	Installment of interest due on said bonds January 1, 1887 (3½%)	77,910.00
	20.	Interest thereon at 6% from January 1, 1887 to May 4, 1888	6,271.75
	21.	Installment of interest due on said bonds July 1, 1887 (3½%)	77,910.00
	22.	Interest thereon at 6% from	

	July 1, 1887 to May 4, 1888.	3,934.45	
23.	Installment of interest due on said bonds January 1, 1888 (3½%)	77,910.00	
24.	Interest thereon at 6% from January 1, 1888 to May 4, 1888	1,597.15	
25.	Principal of Main Line and Western Division Consolidat- ed Mortgage Bonds.....	3,919,000.00	
26.	Interest thereon at 8% from April 1, 1888 to May 4, 1888.	28,739.33	320
27.	Installment of interest due on said bonds April 1, 1885 (4%)	156,760.00	
28.	Interest thereon at 6% from April 1, 1885 to May 4, 1888.	29,078.98	
29.	Installment of interest due on said bonds, October 1, 1885 (4%)	156,760.00	
30.	Interest thereon at 6% from October 1, 1885 to May 4, 1888	24,376.18	
31.	Installment of interest due on said bonds April 1, 1886 (4%)	156,760.00	321
32.	Interest thereon at 6% from April 1, 1886 to May 4, 1888.	19,673.38	
33.	Installment of interest due on said bonds October 1, 1886 (4%)	156,760.00	
34.	Interest thereon at 6% from October 1, 1886 to May 4, 1888	14,970.58	
35.	Installment of interest due on said bonds April 1, 1887 (4%)	156,760.00	

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Answer in Federal Court.

	36. Interest thereon at 6% from April 1, 1887 to May 4, 1888.	10,267.78
	37. Installment of interest due on said bonds October 1, 1887 (4%)	156,760.00
	38. Interest thereon at 6% from October 1, 1887 to May 4, 1888	5,564.98
	39. Installment of interest due on said bonds April 1, 1888 (4%)	156,760.00
323	40. Interest thereon at 6% from April 1, 1888 to May 4, 1888.	862.18
	41. Principal of General Mortgage Bonds	4,305,000.00
	42. Interest thereon at 6% from April 1, 1888 to May 4, 1888.	23,677.50
	43. Installment of interest due on said bonds April 1, 1885 (3%)	129,150.00
	44. Interest thereon at 6% from April 1, 1885 to May 4, 1888.	23,972.32
324	45. Installment of interest due on said bonds October 1, 1885 (3%)	129,150.00
	46. Interest thereon at 6% from October 1, 1885 to May 4, 1888	20,082.82
	47. Installment of interest due on said bonds April 1, 1886 (3%)	129,150.00
	48. Interest thereon at 6% from April 1, 1886 to May 4, 1888.	16,208.32
	49. Installment of interest due on said bonds October 1, 1886 (3%)	129,150.00

50. Interest thereon at 6% from October 1, 1886 to May 4, 1888	12,333.82	
51. Installment of interest due on said bonds April 1, 1887 (3%)	129,150.00	
52. Interest thereon at 6% from April 1, 1887 to May 4, 1888.	8,459.32	
53. Installment of interest due on said bonds October 1, 1887 (3%)	129,150.00	326
54. Interest thereon at 6% from October 1, 1887 to May 4, 1888	4,584.82	
55. Installment of interest due on said bonds April 1, 1888 (3%)	129,150.00	
56. Interest thereon at 6% from April 1, 1888 to May 4, 1888.	710.32	
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Total	\$20,250,583.44	

That the total amount realized upon the sale of the property of the Railway Company in pursuance of said decree of foreclosure and sale was \$10,605,000, leaving a net deficiency of \$9,645,583.44 due and payable for principal and interest upon the said outstanding bonds of the Railway Company. 327

LV. That prior to said decree of foreclosure and sale the Railway Company had incurred a floating indebtedness to divers persons, firms and corporations amounting in the aggregate to upwards of \$3,000,000, in addition to the amounts adjudged by the said decree to be due and payable by the

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Railway Company for principal and interest upon its bonded debt. That included among the said floating indebtedness of the Railway Company were large amounts due and owing by the Railway Company to the Development Company and to the Morgan Company, the facts in relation to which were as follows and not otherwise:

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1. At divers times between December 1, 1883, and August 31, 1886, the Development Company loaned and advanced to and for the benefit of the Railway Company at its request the various amounts of money mentioned in the debit side of the account hereto annexed and marked "Exhibit A," and the Railway Company, in consideration thereof, undertook and promised the Development Company to repay to it on demand the amounts mentioned in such debit side of said account with interest thereon from the respective dates at which such amounts were so loaned and advanced, but such amounts with interest thereon from such dates respectively still remain wholly due and unpaid, and the Railway Company is not entitled to any credits or offsets against the same, except that the Railway Company is entitled to credits in respect thereof to the amounts and as of the dates mentioned on the credit side of said account, Exhibit A, and except so far as the Railway Company may be entitled to further credit in respect to such indebtedness for or by reason of the \$880,000 principal amount of General Mortgage bonds of the re-organized Railroad Company heretofore received by the Development Company and the Morgan Company as hereinafter stated. On or about May 16, 1889, judgment was duly recovered by the Development Company against the Railway Com-

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pany upon such indebtedness in the District Court of the State of Texas for Dallas County for \$858,113.15; and said judgment still remains due and unpaid and has been docketed and recorded in the counties in which the railroad and lands formerly belonging to the Railway Company are situated and the same is a lien upon any interest which the Railway Company may have had therein or in respect thereof to the amount of said judgment, with interest at the rate of eight per cent. per annum (the rate of interest allowed by the laws of the State of Texas thereon) from the date of the recovery thereof, and the Railway Company is not entitled to any credits or offsets against the same except so far as it may be entitled thereto in respect of the \$880,000 principal amount of General Mortgage bonds of the reorganized Railroad Company hereinafter mentioned.

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2. At divers times prior to June 1, 1884, the Morgan Company loaned and advanced to, and for the benefit of the Railway Company at its request certain large sums of money which thereafter were represented by certain promissory notes of the Railway Company in favor of the Morgan Company as stated in the account hereto annexed and marked "Exhibit B," and said notes and each of them still remain due and unpaid by the Railway Company and the Railway Company is not entitled to any credit or offset against the same except that the Railway Company has become entitled to credits in respect thereof as shown by the schedule hereto annexed and marked "Exhibit C" and except so far as it may be entitled thereto for or by reason of the \$880,000 principal amount of General Mortgage

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bonds of the reorganized Railroad Company herein-after mentioned. On or about May 16, 1889, judgment was duly recovered by the Morgan Company against the Railway Company upon said notes in the District Court of the State of Texas for Dallas County for \$1,795,570.81; and said judgment still remains due and unpaid and has been docketed and recorded in the counties in which the railroad and lands formerly belonging to the Railway Company are situated, and the same is a lien upon any interest which the Railway Company may have had therein or in respect thereof to the amount of said judgment with interest at the rate of eight per cent. per annum (the rate of interest allowed by the laws of Texas thereon) from the date of the recovery thereof, except so far as it may be entitled to credit thereon in respect of the items mentioned in said Exhibit C and except so far as it may be entitled thereto in respect of the \$880,000 principal amount of General Mortgage bonds of the reorganized Railroad Company hereinafter mentioned.

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LVI. That in addition to the foregoing indebtedness of the Railway Company, the Railway Company was indebted to the State of Texas to an amount the extent of which was in dispute, the State of Texas claiming about the sum of \$460,000 and the Railway Company admitting an indebtedness of \$190,000.

LVII. That under date of December 20, 1887, an agreement providing for the reorganization of the Railway Company was entered into between certain holders of the outstanding bonds of the Railway Company and this defendant and Central Trust

Company of New York, a corporation organized and existing under the laws of the State of New York, a substantially correct copy of which said agreement is annexed to the bill of complaint herein and marked "Exhibit A." That in and by said agreement it was provided, among other things, as follows:

1. That all of the existing mortgages upon the property of the Railway Company (with the possible exception of those upon the Waco and Northwestern Division) should be foreclosed and that the property of the Railway Company should be vested in a new corporation, which should issue the following classes of securities:

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- (a) New first mortgage bonds to an amount equal to the principal of the outstanding First Mortgage bonds of the Railway Company, secured by first mortgage upon the property of the new company; said bonds to mature July 1, 1937, and to bear interest from July 1, 1887, at the rate of five per cent. per annum, said interest to be guaranteed by this defendant.

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- (b) New consolidated mortgage bonds to an amount equal to the principal of the outstanding Consolidated Mortgage bonds of the Railway Company, secured by second mortgage upon the property of the new company; said bonds to mature October 1, 1912, and to bear interest from October 1, 1887, at the rate of six per cent. per annum, said interest to be guaranteed by this defendant.

(c) New general mortgage bonds to an amount equal to the principal of the outstanding General Mortgage bonds of the Railway Company, secured by third mortgage upon the property of the new company; said bonds to mature April 1, 1921, and to bear interest from October 1, 1887, at the rate of four per cent. per annum, said interest to be guaranteed by this defendant.

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(d) Unsecured debenture bonds to an amount equal to three-fourths of the face value (without interest) of the unpaid coupons maturing on or prior to October 1, 1887, appertaining to the outstanding Consolidated Mortgage bonds of the Railway Company participating in said agreement; said bonds to mature October 1, 1897, and to bear interest from October 1, 1887, at the rate of six per cent. per annum; the principal and interest of said bonds to be guaranteed by this defendant.

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(e) Unsecured debenture bonds to an amount equal to two-thirds of the face value (without interest) of the unpaid coupons maturing on or prior to October 1, 1887, appertaining to the outstanding General Mortgage bonds of the Railway Company participating in said agreement (other than the coupons appertaining to the \$880,000 principal amount of outstanding General Mortgage bonds hypothecated with the Morgan Company and the Development Company); said bonds to bear

interest from October 1, 1887, at the rate of four per cent. per annum; the principal and interest of said bonds to be guaranteed by this defendant.

- (f) Capital stock to the amount of \$10,000,000 par value.

2. That new first mortgage bonds, consolidated mortgage bonds, general mortgage bonds, six per cent. debentures, four per cent. debentures and cash should be distributed as follows:

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- (a) To holders of outstanding First Mortgage bonds of the Railway Company, for each \$1,000 principal amount of said bonds deposited by them, (A) \$50 in cash; (B) \$1,000 principal amount of new first mortgage bonds; and (C) an amount in cash equal to the face value (without interest) of the unpaid coupons maturing on and prior to July 1, 1887, appertaining to said outstanding bonds.

- (b) To holders of outstanding Consolidated Mortgage bonds of the Railway Company (other than the \$1,149,000 principal amount of said bonds held by the trustee of the General Mortgage of the Railway Company), for each \$1,000 principal amount of said bonds deposited by them and upon payment of \$7.50 for each such bond deposited, (A) \$1,000 principal amount of new consolidated mortgage bonds; and (B) six per cent. debentures to an amount equal to three-fourths of

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the face value (without interest) of the unpaid coupons maturing on and prior to October 1, 1887, appertaining to each such deposited bond.

- (bb) To the trustee of the new general mortgage of the New Company, to be held by it as part of the security for the bonds thereby secured, \$1,149,000 principal amount of new consolidated mortgage bonds.

- (c) To holders of outstanding General Mortgage bonds of the Railway Company (other than \$880,000 principal amount of said bonds hypothecated with the Morgan Company and the Development Company), for each \$1,000 principal amount of said bonds deposited by them and upon payment of \$7.50 for each such bond deposited, (A) \$1,000 principal amount of new general mortgage bonds; and (B) four per cent. debentures to an amount equal to two-thirds of the face value (without interest) of the unpaid coupons maturing on and prior to October 1, 1887, appertaining to each such deposited bond.

- (cc) To the Morgan Company and the Development Company, in satisfaction of \$880,000 of the indebtedness to them of the Railway Company, and upon the surrender of \$880,000 principal amount of outstanding General Mortgage bonds hypothecated with them as collateral security for such indebtedness, \$880,000

principal amount of new general mortgage bonds.

- (d) That a syndicate might be organized for the purpose of providing cash to the amount necessary for distribution to bondholders not participating in said agreement, said syndicate, upon providing such amount of cash, to be entitled to the rights, privileges and benefits to which such bondholders would have been entitled in case they had become parties to said agreement.

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3. That the \$10,000,000 par value of capital stock of the New Company should be disposed of as provided by the following provisions of said agreement:

"NINTH: The said ten million dollars (\$10,000,000) par value of said new stock is to be issued to, and shall be divided pro rata among, such holders of the floating debt of the said railway company as, within a time to be prescribed by said trust company may provide a pro rata share, proportionate to the whole floating debt of the company, of the cash payments to be made hereunder for interest and bonus to the holders of the first-mortgage bonds and coupons and for the necessary charges, expenses and liabilities incurred, or to be incurred, by the said trust company in carrying out the provisions of this agreement.

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"Provided, however, that the holders of the existing capital stock of the Houston

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and Texas Central Railway Company may, within a time to be prescribed by said trust company therefor, if they shall elect so to do, provide their pro rata share proportionate to the whole outstanding capital of the present company of the amount requisite to discharge the floating debt of the company, and to provide for the cash payments, charges, expenses and liabilities above referred to; and in that event they shall be entitled to receive a like proportionate amount of stock of said reorganized company.

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"The amount of such pro rata share to be paid, whether by the holders of the floating indebtedness of said company, or by said stockholders, is to be fixed and determined by said trust company.

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"TENTH : In the event that any portion of such capital stock shall not be taken up by either the holders of the floating indebtedness of said Houston and Texas Central Railway Company, or by the stockholders thereof, under the provisions in that behalf hereinbefore contained, then, and in that event the Southern Pacific Company or its appointee, upon providing such portion of the cash payments to be made hereunder for interest and bonds to the holders of the first mortgage bonds and coupons and for the necessary charges, liabilities and expenses incurred by said trust company in carrying out the provisions of this agreement, as shall not have been provided by the floating-debt creditors or stockholders of the said Houston

and Texas Central Railway Company hereunder, shall be entitled to the entire balance of stock of the new company not so taken. * * *

LVIII. That except as provided in said reorganization agreement, no stockholder of the Railway Company was or is entitled to any share or interest in the property of the Railway Company or in the property or stock of the new company contemplated by said agreement except upon payment in full of the amounts due and payable by the Railway Company for principal and interest upon the bonded and floating debt of the Railway Company.

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LIX. That by the terms of said reorganization agreement the stockholders of the Railway Company were not required to pay any part of the principal of the bonded indebtedness of the Railway Company, or to pay any part of the interest thereon except as set forth in said agreement in order to acquire an interest in the stock of the new company therein referred to, but that by the terms of said agreement said stockholders were permitted to acquire an amount of stock of the new company proportionate to the amount of stock of the Railway Company owned by them upon payment of their *pro rata* share, as determined by Central Trust Company of New York, of the amount requisite to discharge the floating debt of the Railway Company, of the cash payments to be made under said agreement for interest and bonus to the holders of first mortgage bonds and coupons, and for the necessary charges, expenses and liabilities incurred or to be incurred by said trust company in carrying out the provisions of said agreement.

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LX. That said reorganization agreement was carried out and the railroad property of the Railway Company purchased by Frederic P. Olcott under the decree of foreclosure and sale above referred to was conveyed to the Railroad Company, the new company organized for said purpose as provided in said reorganization agreement; that the issue of the several classes of securities of the Railroad Company contemplated by said reorganization agreement was duly authorized by the Railroad Company and that said securities were duly issued by it in the following amounts:

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First Mortgage five per cent. bonds	\$8,064,000
Consolidated Mortgage six per cent. bonds	5,068,000
General Mortgage four per cent. bonds	4,305,000
Six per cent. debentures.....	705,420
Four per cent. debentures.....	411,000
Capital stock	10,000,000

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LXI. That the interest upon the said bonds and the principal and interest of the said debentures were duly guaranteed by this defendant and that said bonds and debentures, guaranteed as aforesaid, were duly distributed as provided in said reorganization agreement, together with the sum of \$2,602,615.71 in cash required by the terms of said agreement for the payment of interest and bonus to the holders of deposited bonds and coupons.

LXII. That, as provided by said reorganization agreement, the total amount payable by stockholders of the Railway Company in order to entitle them to receive the stock of the Railroad Company

was duly fixed and determined by Central Trust Company of New York at the sum of \$5,516,221.44, and that the amount of such *pro rata* share to be paid by each of said stockholders was duly fixed and determined by said trust company at \$71.40 for each share of stock of the Railway Company of the par value of \$100 each; and, that thereafter a time was duly prescribed by said trust company for such payment by said stockholders and notice thereof was duly given to said stockholders.

LXIII. That neither the complainants' testator nor any other stockholder of the Railway Company availed himself of the right to acquire stock of the Railroad Company as provided by said reorganization agreement or paid or offered to pay to Central Trust Company of New York within the time prescribed by it for such purpose or at any other time the amount payable by him as provided in said reorganization agreement or any part thereof, or any part of the principal or interest upon the bonded or floating debt of the Railway Company, and that no portion of the capital stock of the Railroad Company was taken up by either the holders of the floating indebtedness of the Railway Company or by the stockholders thereof. That thereupon this defendant provided and paid to said trust company the entire amount of the cash payments to be made under said reorganization agreement for interest and bonds to the holders of first mortgage bonds and coupons and for the necessary charges, liabilities and expenses incurred by said trust company in carrying out the provisions of said agreement, amounting in all to more than \$2,500,000; and that in consideration of such payment by this defendant and of the guarantees and liabilities in-

curred by this defendant as provided in said agreement, there were delivered to and acquired by this defendant certificates representing the entire \$10,000,000 par value of capital stock of the Railroad Company except directors' qualifying shares.

AS AND FOR AN EIGHTH SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT ALLEGES UPON INFORMATION AND BELIEF :

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LXIV. The defendant realleges and reiterates all of the matters and things set forth in articles XLVII to LXIII, both inclusive, of this answer, with the same force and effect as herein again set forth at length.

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LXV. That on or about December 23, 1889, a bill of complaint was filed in the Circuit Court of the United States for the Eastern District of Texas, in a suit in equity brought therein by S. W. Carey, Warren S. Sillocks, J. Van Schaick, D. P. Ingraham, Jr., James Landale, George Wilson and Andrew S. McClelland, as stockholders of the Railway Company, suing on behalf of themselves and of all other stockholders of the Railway Company similarly situated who might come in and contribute to the expenses of said action, as complainants, against the Railway Company, Central Trust Company of New York and this defendant and others as defendants, and that thereafter and on or about February 18, 1890, an amended bill of complaint was filed by the said complainants in the said suit. That in and by said amended bill of complaint, it was alleged among other things that the decree of foreclosure and sale hereinbefore referred to was fraudulent and void; that the reorganization agree-

ment hereinbefore referred to was a fraud upon the stockholders of the Railway Company and that the amount fixed by the Central Trust Company of New York as payable by the stockholders of the Railway Company in order to entitle them to acquire stock of the Railroad Company was wrongfully and fraudulently contrived and made up as part of a scheme and plan for obtaining possession of the Railway Company and its property. That said amended bill of complaint prayed among other things that said decree of foreclosure and sale and the sale thereunder of the railroad and property of the Railway Company be vacated and set aside and that the defendants in said suit be enjoined from delivering or disposing of any of the bonds or stock of the Railroad Company provided for in the reorganization agreement.

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That thereafter this defendant and the Railway Company and the other defendants in said suit appeared generally therein as parties defendant and filed answers to said amended bill of complaint; that testimony was taken in said suit and the same was brought on for hearing and heard on the merits and that on or about November 16, 1892, a final decree was duly filed and entered therein in the office of the Clerk of the United States Circuit Court for the Eastern District of Texas, dismissing said suit on the merits.

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That the complainants in said suit appealed from said decree of the Circuit Court of the United States for the Eastern District of Texas to the Supreme Court of the United States; that said appeal came on to be heard at the October, 1893, term of said court and was argued by counsel; and that thereafter a decision was rendered by said Supreme Court dismissing said appeal.

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That the complainants in said suit also appealed from said decree of the Circuit Court of the United States for the Eastern District of Texas to the United States Circuit Court of Appeals for the Fifth Judicial Circuit; that said appeal came on to be heard at the June, 1894, term of said court and was argued by counsel; and that thereafter a decision was rendered by said Circuit Court of Appeals affirming the decree appealed from.

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That the complainants in said suit thereupon appealed to the Supreme Court of the United States from the decree of the said Circuit Court of Appeals affirming the decree of said Circuit Court; that said appeal came on to be heard at the October, 1895, term of said Supreme Court and was argued by counsel; and that thereafter a decision was rendered by said Supreme Court dismissing said appeal.

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LXVI. That at the time of the filing and entry of said decree of November 16, 1892, of the Circuit Court of the United States for the Eastern District of Texas, said Court had full and complete jurisdiction of the parties in said suit, including the Railway Company and this defendant, and that at the time of the filing and entry of said decree said Court had full and complete jurisdiction of the subject-matter of said suit; that said decree of November 16, 1892, ever since the date of the entry and filing thereof has been and still is in full force and effect and binding and conclusive upon the Railway Company and its stockholders, including the complainants herein and their testator as to the matters determined in said suit, including the right of this defendant to acquire, receive and hold the stock of the Railroad Company as provided in said reorganization agreement.

AS AND FOR A NINTH, SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT ALLEGES UPON INFORMATION AND BELIEF:

LXVII. The defendant reiterates and realleges all of the matters and things set forth in articles XLVII to XLVIII, both inclusive, of this answer, with the same force and effect as if herein again set forth at length.

LXVIII. That on or about August 15, 1890, an action was brought in the Supreme Court of the State of New York in and for the County of New York, by Michael Gernsheim, Eugene A. Loeb and Albert Loeb, as stockholders of the Railway Company, suing on behalf of themselves and others similarly situated who might come in and contribute to the expenses of said action, as plaintiffs, against Central Trust Company of New York and against this defendant and the Railway Company and others as defendants. That in and by the complaint in said action it was alleged among other things that the amount fixed by said Central Trust Company of New York as payable by the stockholders of the Railway Company in order to entitle them to acquire stock of the Railroad Company was unauthorized, unnecessarily high and excessive and included amounts, claims and demands which the stockholders of the Railway Company could not be required to pay under the reorganization agreement or otherwise, and was wrongfully and fraudulently contrived and made in bad faith as part of a scheme and plan to bar out the stockholders of the Railway Company and to enable this defendant to acquire under the reorganization plan the entire stock of the Railroad Company and to defraud the

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stockholders of the Railway Company. That the complaint in said action prayed among other things for an injunction enjoining the defendants therein from delivering or disposing of any of the bonds or stock of the Railroad Company provided for in the reorganization agreement and from delivering said stock of the Railway Company or any part thereof to this defendant by reason of the failure of the plaintiffs in said action or of any other stockholder of the Railway Company similarly situated to pay the amount theretofore fixed by said Central Trust Company of New York as a condition precedent to participation in the stock, assets or property of the Railroad Company; that this defendant be enjoined from receiving, accepting or disposing of any of the said stock; and that it be adjudged and decreed that said trust company had no right or authority to fix or determine the amount to be paid by the plaintiffs in said action as a condition of participating in the stock of the Railroad Company, and that the amount of such payment fixed by said trust company was unauthorized and not permitted by the reorganization agreement and excessive and not made pursuant to such agreement or as contemplated by it.

That thereafter this defendant and the Railway Company and Central Trust Company of New York appeared generally in said action as parties defendant therein, and a motion was made by the plaintiffs in said action for an injunction *pendente lite* conformably to the prayer of the complaint therein. That said motion came on to be heard at Special Term of the Supreme Court of the State of New York for the County of New York, and was argued by counsel for the plaintiffs and for the defendants therein and proofs submitted for and

against the motion for said injunction; and that thereafter a decision was rendered by the Court in said action holding that the action of said Central Trust Company of New York in the premises was in all respects due, lawful and proper and authorized by the terms of said reorganization agreement; that the plaintiffs were not entitled to an injunction enjoining said trust company from delivering to this defendant or this defendant receiving from said trust company the stock of the Railroad Company as provided in the reorganization agreement, and that the motion of the plaintiffs for an injunction should be denied. That thereafter and on or about October 10, 1890, an order was duly made and entered in said action in the Supreme Court of the State of New York for the County of New York denying in all respects the motion of the plaintiffs for an injunction in said action; that the plaintiffs appealed from said order to the General Term of said Supreme Court; that said appeal came on to be heard at the November, 1890, term of said General Term and was argued by counsel; that thereafter a decision was rendered by said General Term affirming in all respects the order appealed from; and that on or about October 27, 1891, an order was duly made and entered by said General Term affirming the order appealed from.

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LXIX. That at the time of the entry of said orders of October 10, 1890, and October 27, 1891, and each of them, the Supreme Court of the State of New York had full and complete jurisdiction of the parties in said action including the Railway Company and this defendant, and that at the time of the entry of said orders and each of them, said Supreme Court of the State of New York had full

and complete jurisdiction of the subject matter of said action; that said orders of October 10, 1890, and October 27, 1891, ever since the dates of the entry thereof have been and still are and each of them has been and still is in full force and effect and binding and conclusive upon the Railway Company and its stockholders including the complainants herein and their testator as to the matters determined in said action, including the right of this defendant to acquire, receive and hold the stock of the Railroad Company as provided in said reorganization agreement.

AS AND FOR A TENTH SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT ALLEGES UPON INFORMATION AND BELIEF :

LXX. The defendant reiterates and realleges all of the matters and things set forth in Articles LXV, LXVI, LXVIII and LXIX.

LXXI. That each of said suits was brought not only on behalf of the persons named as complainants therein, but on behalf of themselves as stockholders of the Railway Company and all others similarly situated, including the members of a committee acting on behalf of said stockholders, of which said committee Walter B. Lawrence was a member, and that each of said suits was brought on behalf of and in the interest of the said Walter B. Lawrence, who had full knowledge of the facts as alleged in the bills of complaint filed in said suits, and who was familiar with the grounds upon which each of said suits was brought.

LXXII. That by the institution and prosecution of said suits and each of them the complainants in

each of said suits named and the stockholders on whose behalf said suits were brought, including the said Walter B. Lawrence, made a choice or election of remedies that bars and estops them and each of them and him from maintaining the present action against this defendant.

WHEREFORE the defendant demands judgment dismissing the bill of complaint herein, together with the costs of this suit.

SOUTHERN PACIFIC COMPANY,

By Joline, Larkin & Rathbone,

By Arthur H. Van Brunt,

Henry V. Poor,

Members of said firm,

Its Solicitors.

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State of New York,

Southern District of New York, } ss. :

County of New York,

Andrew K. Van Deventer, being duly sworn, deposes and says that he is an officer, to wit, the Treasurer of Southern Pacific Company, the defendant herein; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he is credibly informed and believes the same to be true.

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ANDREW K. VAN DEVENTER.

Subscribed and sworn to before me this
30th day of October, 1913.

W. C. WARNE,

(Seal) Notary Public, Kings County No. 129.

Certificate filed in New York County No. 48.

Exhibit A, Attached to Answer.

HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY IN ACCOUNT WITH SOUTHERN DEVELOPMENT COMPANY.

Dr.				Cr.			
1883.				1884.			
Dec. 19	To	Asst. Treasurer, U. S. in N. Y. in settlement of suit for Internal Revenue Taxes on Receipts of the Co. from Jan'y. 1, 1865, to Dec. 31, 1871	\$30,000.00	6712	\$11,910.00		
1884.							
April 9	To	U. S. Trust Co., 6 mos. Interest on Loan \$200,000, Oct. 9, 1883, to April 9, 1884, 6 per cent.	6,000.00	6322	2,272.00		
July 1	"	Jno. J. Cisco & Sons, Acc't Coupons.....	200,000.00	61	73,000.00		
" 2	"	" " " " " "	50,000.00	6029	18,241.67		
" 3	"	" " " " " "	25,000.00	6028	9,116.67		
" 8	"	" " " " " "	25,000.00	6023	9,095.83		
" 10	"	U. S. Trust Co. Interest on Loan.....	3,033.33	6021	1,102.61		
" 15	"	Jno. J. Cisco & Sons, Acc't Coupons.....	25,000.00	6016	9,066.67		
Oct. 1	"	Expenses N. Y. & Boston Agencies, April, May and June.....	2,500.00	510	875.00		
Nov. 15	"	Amos R. Eno, Loan, Feb. 15, 1884.....	100,000.00	5816	34,267.00		
Dec. 3	"	Nat. City Bank, Loan, July 30, 1884.....	50,000.00	5728	16,983.33		
" 19	"	Jno. J. Cisco & Sons, Acc't Coupons.....	5,000.00	5712	1,685.00		
" 22	"	" " " " " "	5,000.00	579	1,682.50		
" 24	"	" " " " " "	5,753.97	577	1,934.28		
" 26	"	H. & T. C. Gen'l Mtge. Coupons, 5 at \$35....	150.00	575	50.37		
" 29	"	Texas Central R'y Co. Coupons, 1 at \$35, Nov. 1884	35.00	572	11.74		
" 31	"	Penna. Coal Co. Interest on Loan \$2,850.00....					
" 31	"	Fourth Nat'l Bank, Interest on Loan 733.33....					
			3,583.33	57	1,200.42		
1885							
Jan'y. 3	"	H. & T. C. R'y Coupons, 1 No. 36.....	35.00	5628	11.71		
" 6	"	" " " " " 1 " 24, Consol'd..	40.00	5625	13.37		
" 8	"	" " " " " 2 " 36, 2 No. 35..					
" 9	"	Tex. Cent.....	140.00	5623	46.74		
" 10	"	Fourth Nat. Bank, Loan and Interest.....	50,075.00	5622	16,708.36		
" 12	"	H. & T. C. R'y Coupons, 2 No. 36.....	70.00	5621	23.35		
" 19	"	U. S. Trust Co., Loan and Interest.....	200,200.00	5619	68,698.96		
" 19	"	H. & T. C. R'y Coupons, 1 No. 36.....	35.00	5612	11.62		
" 20	"	Tex. Cent. R'y " 5 Nov. 1, 1884.....	175.00	5611	58.07		
" 22	"	Chas. H. Tweed, Disbursements.....	7.29	569	2.42		
" 31	"	H. & T. C. Ry. Coupons, 1 No. 36.....	35.00	56	11.55		
Feb'y. 1	"	" " " " " 4 No. 36.....	140.00	56	46.20		
" 4	"	" " " " " 38 Cons'd, 18 Tex. C.	2,150.00	5527	708.43		
" 9	"	" " " " " 2 No. 36.....	70.00	5522	23.01		
" 11	"	" " " " " No. 35, 6, 1 ea. \$70..					
" 11	"	Expenses N. Y. & Boston Agencies, Jan'y. 200..					
			270.00	5520	88.65		
" 25	"	H. & T. C. R'y Coupons, 1 No. 36.....	35.00	5556	11.41		
Mch. 4	"	" " " " " 1 " 35.....	35.00	5427	11.36		
" 6	"	" " " " " 2 " 36.....	70.00	5425	22.69		
" 11	"	" " " " " 1 " 36.....	35.00	5420	11.32		
" 13	"	Expenses N. Y. & Boston Agencies, Feb'y.....	300.00	5418	96.90		
" 20	"	Tex. Cent. R'y Co. Coupons, 18 at \$35.....	630.00	5411	202.75		
April 4	"	H. & T. C. " 2 at \$35.....	70.00	5327	22.37		
" 10	"	Expenses N. Y. & Boston Agencies, Mch.....	300.00	5321	95.55		
1886.							
Aug. 30	"	Pac. Impt. Co. for Sundry Advances.....	106.00	3111	25.14		
"	"	Balance of Interest.....	231,979.80				
			\$1,029,059.62		\$279,446.69		

Apr. 14	By	E. W. Cave, Treas'r, covering amount paid April 9, to U. S. Trust Co. for Interest on Loan \$200,000.....	\$6,000.00	6317	\$2,267.00		
July 11	"	Jno. J. Cisco & Sons, Interest on Loan U. S. Trust Co. paid 10th inst. returned.....	3,033.33	6020	1,102.10		
Sept. 24	"	E. W. Cave, Treas'r Cashier, Acc't Advances..	100,000.00	5107	35,116.67		
Dec. 24	"	Phenix Iron Co., Note Collected.....	8,437.05	577	2,836.26		
1885.							
Jan'y. 3	"	" " " " " "	10,867.50	5628	3,636.99		
" 5	"	" " " " " "	6,491.70	5626	2,170.40		
1886.							
Sept. 28	"	E. W. Cave, Treas'r, Acc't Advances by Pacific Improvement Co.....	1,143.50	3103	263.58		
1887.							
Feb'y. 7	"	E. W. Cave, Treas'r, Acc't Advances by Pacific Improvement Co.....	353.57	3524	73.89		
		BALANCE OF INTEREST.....			231,979.80		
		" " ACCOUNT.....	802,732.97				

\$1,029,059.62 \$279,446.69



Exhibit B, Attached to Answer.

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**HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY
NOTES DUE MORGAN'S LOUISIANA AND TEXAS RAILROAD AND
STEAMSHIP COMPANY**

Date of Note.

July 31, 1878,	Demand 7 per cent.	\$335,276.53
June 15, 1882,	" 6 "	150,000.00
April 28, 1883,	" 6 "	85,000.00
June 29, 1883,	" 6 "	225,000.00
Oct. 17, 1883,	" 6 "	50,000.00
Nov. 20, 1883,	" 6 "	50,000.00
" 21, 1883,	" 6 "	100,000.00
Dec. 6, 1883,	" 6 "	50,000.00
" 29, 1883,	" 6 "	90,000.00
Jan. 17, 1884,	" 6 "	50,000.00
Mch. 4, 1884,	" 6 "	46,000.00
" 31, 1884,	" 6 "	200,000.00
April 30, 1884,	" 6 "	115,000.00
May 12, 1884,	" 6 "	40,000.00
" 25, 1884,	" 6 "	30,037.50

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\$1,616,314.03

Exhibit C, Attached to Answer.

Dec. 21, 1880	Cash	\$100,000.00
Feb. 15, 1882	"	75,000.00
Jan. 10, 1885	"	153,811.65
Apr. 25, 1885	By collection acc't Waco Bonds	8,240.00
Apr. 10, 1886	" " " "	7,240.00
Apr. 10, 1887	" " " "	7,000.00
Mch. 5, 1887	By sale of 1,972 shares of stock, Cent. Tex. & N. West. R. R.	5,916.00
Mch. 24, 1887	By note and interest of the Cent. Tex. & N. West. R. R.	91,540.95
Sept. 27, 1887	By sale of 513 shares of stock, Union Compress & Warehouse Co., and 3,211 shares of stock, Central Mining Mfg. & Land Co.	25,000.00
Jan. 2, 1888	By cash on acc't	1,345.00
Mch. 31, 1888	By collection acc't Waco Bonds	6,311.00
May 31, 1888	" " " "	3,179.00
Mch. 28, 1889	" " " "	7,029.00
Sept. 19, 1889	" " McKinney Bonds	2,328.50
May 23, 1890	" " Waco Bonds	4,860.00
June 2, 1891	" " Sherman Bonds	57,675.04
Sept. 12, 1891	" " Waco Bonds	2,240.00

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\$558,716.14

400 **Defendant's Notice of Motion to Dis-**
miss Complaint.

(Filed February 9, 1914.)

IN THE DISTRICT COURT OF THE
UNITED STATES,

FOR THE EASTERN DISTRICT OF NEW YORK.

401 HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

Sirs:

402 PLEASE TO TAKE NOTICE that upon the
bill of complaint and answer herein, we shall move
this Court at a stated term thereof to be held in
the United States Post Office Building, Borough
of Brooklyn, County of Kings in the Eastern Dis-
trict of New York, on the 10th day of December,
1913, at 2 o'clock in the afternoon of said day, or
as soon thereafter as counsel can be heard, for a
decree dismissing the bill of complaint herein, and
for such other decree, judgment, order and relief
as may be just and proper, upon the following
grounds:

FIRST.—That it appears upon the face of the bill
of complaint herein that the Houston and Texas
Railway company is a corporation organized and

Defendant's Notice of Motion to Dismiss Com- 403
plaint.

existing under the laws of the State of Texas, and is an indispensable party to this suit; that said Houston and Texas Railway Company is not a party plaintiff or defendant herein, and that there is a defect of parties herein in that the said Railway Company is not a party plaintiff or defendant to this suit.

SECOND.—That it appears upon the face of the bill of complaint herein that the complainants and their testator are guilty of laches, in that all of the matters and things alleged in the bill of complaint herein in respect to the alleged cause of action in said bill of complaint attempted to be set forth happened and occurred in and prior to the year 1888; that, as appears upon the face of the bill of complaint herein, the complainants' testator, at all times from the date of the matters complained of as a basis for the alleged cause of action in the bill of complaint herein attempted to be set forth, had notice of all of the said matters, but that no action, suit or proceeding at law or in equity was brought, instituted or begun by the complainants' testator against this defendant by reason of said matters or any of them until the year 1908, or twenty years after the complainants' testator's alleged cause of action had accrued, when the suit referred to in Article Thirty-eight of the bill of complaint herein was begun; and that the present suit was not brought until the year 1913, more than twenty-five years after the said alleged cause of action had accrued. 404 405

THIRD.—That it appears upon the face of the bill of complaint herein that the complainants and their testator are guilty of laches, in that all of the matters and things alleged in the bill of com-

406 *Defendant's Notice of Motion to Dismiss Com-
plaint.*

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Dated, November 26th, 1913.

408

Yours, &c.,

JOLINE, LARKIN & RATHBONE,

By ARTHUR H. VAN BRUNT,

HENRY V. POOR,

Members of said Firm,

Solicitors for Defendant,

Office and Post Office Address,

54 Wall Street,

Borough of Manhattan,

City of New York.

To

DITTENHOEFER, GERBER & JAMES, Esqs.,

Solicitors for Complainants,

96 Broadway,

New York City.

*Opinion on Denial of Defendant's Motion to
Dismiss.*

409

(NOTE.—The defendant submitted to the Court, without objection, in support of its motion to dismiss the bill of complaint herein, the complaint in the case of Walter B. Lawrence against the Southern Pacific Company et al., which last mentioned complaint is omitted at this point of this record for the reason that the same is printed in full in Defendant's Exhibit F, the same being the record on appeal to the United States Supreme Court in the said case of Lawrence against the Southern Pacific Company et al.)

410

Opinion on Denial of Defendant's Motion to Dismiss.

(Filed March 3, 1914.)

IN THE

DISTRICT COURT OF THE UNITED STATES,
FOR THE ^{*Eastern*} ~~SOUTHERN~~ DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

411

CHATFIELD, J.:

This action has been removed by defendant from the Supreme Court of New York and an answer has been filed in this Court. The complaint has been drawn to meet the questions raised in a previous action in which dismissal resulted from inability to serve or bring in an indispensable party. (Lawrence vs. Southern Pac. Co. et al., 180 Fed., 822.)

412 *Opinion on Denial of Defendant's Motion to Dismiss.*

Demurrers having been abolished, the defendant has pleaded the alleged lack of the same party upon the claim that the cause of action has not been changed and that the indispensable party is still absent.

Rule 29 provides :

413

“Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, non-joinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree pro confesso entered.”

414

The defendant has now moved to dismiss and for judgment on the merits upon the pleadings because of the alleged defect of parties as shown by the defense interposed as above, and has asked for disposition thereof before trial of the “principal case.”

Opinion on Denial of Defendant's Motion to Dismiss. 415

The plaintiff claims that under Rule 29 such motion should be "made by motion to dismiss," or if that is not made and answer be interposed (as has been done) that the right to make a motion to dismiss has been waived.

The plaintiff asserts that the last clause of the rule relates back to a motion upon the complaint alone and is not the equivalent of a hearing on the "plea in bar."

It is apparent that if the facts are sufficiently shown by the pleadings and if both parties agree, a hearing can be had upon a motion made upon the pleadings in advance of trial as well as if trial were called and the plea were considered upon the record at the outset of the trial or before the taking of testimony. 416

On the other hand, if testimony is needed or offered by either party upon the plea, then a "hearing" is necessarily held ipso facto whether on the motion or at the trial. As the case is brought in equity and will be heard in open court without any jury, the only differences will be in the matter of convenience and in the possibility of disposing of the whole issue upon the plea as interposed. 417

The motion to dismiss the bill if denied would require a hearing of the other defenses rather than a direction to answer over as provided for in the rule.

The defendant has also raised the defense of laches and as to this depends upon the record of the pleadings as to elapsed time, previous litigations and the charge that the plaintiff, in bringing a representative action upon alleged causes of action which were open to the plaintiffs in the prior actions (of which the plaintiff had knowledge) is burdened with the delay or estoppel resulting from their wrong choice of remedy.

418

*Opinion on Denial of Defendant's Motion to
Dismiss.*

Unless this motion be treated as a hearing and opportunity be given to both sides to make a record, it is apparent that the motion must be based upon the complaint alone.

The defendant cannot prove facts by allegations in his answer and by moving thereon as if they were admitted or stated in the complaint. In other words, such a motion must be judged solely by the plaintiff's pleadings.

419

In the present instance the case is on the calendar and the defendant invokes the record of the other cases above referred to in such a way that they must be treated as proofs if the plea is to be determined in advance of hearing upon the merits.

The motion to dismiss will therefore be denied but upon the call of the case the plea will be heard upon such record as may be offered before the taking of testimony in support of the main issue.

420

Order Denying Defendant's Motion to Dismiss. 421

(Filed March 11, 1914.)

At a stated term of the United States District Court for the Eastern District of New York, held at the Court Rooms in the Post Office Building in Borough of Brooklyn, in said District, on the 11th day of March, 1914.

Present—Hon. THOMAS I. CHATFIELD, Judge.

422

HENRY L. BOGERT et al.,
Plaintiffs,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

This cause came on to be heard at this term upon defendant's motion to dismiss, and was argued by counsel, and thereupon, upon consideration thereof, it was

423

ORDERED, ADJUDGED AND DECREED as follows: That the motion to dismiss made upon the complaint and answer upon the grounds set forth in the notice of motion be denied, but without prejudice to any motion on behalf of the defendant for the trial of any separate defense set up in the answer prior to the commencement of the taking of testimony upon the principal issues, and without prejudice to the hearing and determination of any defense so pleaded.

THOMAS I. CHATFIELD,
U. S. D. J.

424

Trial of Separate Defenses.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

425

SOUTHERN PACIFIC COMPANY,
Defendant.

Brooklyn, N. Y., March 25, 1914.

Before—Hon. THOMAS I. CHATFIELD, Judge.

APPEARANCES :

DITTENHOEFER, GERBER & JAMES (by David Gerber
and Dudley F. Phelps), for Complainants.

426

JOLINE, LARKIN & RATHBONE (by Arthur H. Van
Brunt and Lewis H. Freedman), for De-
fendant.

Case called for trial.

Mr. Van Brunt : Prior to proceeding with
the trial on the merits, the defendant moves
for a hearing on the separate defenses raised
by the answer, the principal of which are,
absence of an indispensable party, laches and
res adjudicata.

Mr. Phelps: I object on the ground that it is too late, as answer has already been filed, and specially on the ground that with the exception of the point of *res adjudicata*, the motion has already been made since the filing of the answer and has been disposed of by the Court in the plaintiff's favor, and that it should therefore be denied.

The Court: Objection overruled, inasmuch as the decision upon the motion was merely a construction of Rule 29, and the decision of the motion allowed the defendant to bring on the separate pleas for hearing as if the motion had not been made.

428

Plaintiff excepts.

Case marked ready for hearing upon the separate pleas before the trial of the principal issue.

Mr. Van Brunt: I offer in evidence a copy of the complaint. This offer is made simply in support of the separate defenses.

The same is received in evidence and marked Exhibit A.

429

Mr. Van Brunt: The defendant does not move the present hearing on the 7th separate defense and requests that the hearing on this defense be had at the time of the trial of the main issue. All evidence offered at the present time is offered on behalf of each and every of the other separate defenses.

Mr. Van Brunt: I offer in evidence a copy of a record in the case of *S. W. Carey et al. against the Houston and Texas Central Railway Company in the United States*

Circuit Court of Appeals for the 5th Circuit.

The same is received in evidence and marked Exhibit B of this date.

It is stipulated as to all records that the contents thereof shall be considered in evidence and either party may be at liberty to use or quote from the same without further offer.

It is further understood and stipulated that all stipulations contained in such records shall have the same force and effect as though made in the present action.

Mr. Van Brunt: I offer in evidence a printed copy of the appeal papers to the General Term of the Supreme Court of the State of New York, First Department, in the case of Michael Gernsheim and others against Frederic P. Olcott and others, being the appeal in the first action, said notice of appeal being dated January 14, 1890.

The same is received in evidence and marked Exhibit C of this date.

Mr. Van Brunt: I further offer in evidence a printed record of the Supreme Court of the State of New York, General Term, First Department, in the case of Michael Gernsheim and others against the Central Trust Company of New York and Frederic P. Olcott, said notice of appeal being dated October 13, 1890.

The same is received in evidence and marked Exhibit D of this date.

Mr. Van Brunt: I offer in evidence a printed copy of the record in the Court of Appeals of the State of New York in the case of Cornelius MacArdell against Fred-

eric P. Olcott and others, consisting of two printed volumes.

The same is received in evidence and marked Exhibit E of this date.

Mr. Van Brunt: I offer in evidence a printed record in the Supreme Court of the United States in the case of Walter B. Lawrence against the Southern Pacific Company et al.

The same is received in evidence and marked Exhibit F of this date.

Mr. Van Brunt: I further offer in evidence the opinion of Mr. Justice Patterson in the case of Gernsheim against Olcott, 7 N. Y. Sup., 872, being the opinion of Mr. Justice Patterson on the first injunction motion in which the record has been offered and marked Exhibit C.

434

I further offer in evidence the opinion of Mr. Justice Barrett, written in the General Term of the 1st Department in the case of Gernsheim vs. Olcott, 10 N. Y. Sup., 438, being the opinion on appeal in the same case.

435

I further offer in evidence the per curiam opinion of the General Term in the case of Gernsheim against the Central Trust Company, being the opinion of that Court on the second appeal in which the record has been offered and marked Exhibit D, and containing in full the opinion of Mr. Justice Patterson on the motion below, reported in 16 N. Y. Sup., page 137.

I offer in evidence the opinion of Judge Pardee in 45 Fed. Rep., 438, being the opinion on motion for preliminary injunction in the case of Carey against H. & T. C. Rail-

436

way Company, the record in which case has already been offered and marked Exhibit B.

I also offer in evidence the opinion of Judge Pardee in the same case, reported in 52 Fed. Rep., 671, being the opinion rendered after hearing on the merits and directing a dismissal of the appeal.

437

I further offer in evidence the opinion in the case of Carey against H. & T. C. Railway Company, reported in 150 U. S., 170, being the opinion of the United States Court dismissing the direct appeal.

I further offer in evidence the opinion of the Circuit Court of Appeals in the case of Carey against the H. & T. C. Railway Company, 9 C. C. A., 687, being the opinion of the Court affirming the dismissal of the case of Judge Pardee.

438

I further offer in evidence the opinion of the Supreme Court of the United States in Carey against the H. & T. C. Railway Company, reported in 161 U. S., 115, being the opinion dismissing the appeal from the affirmation of the Circuit Court of Appeals.

I further offer in evidence the opinion of Mr. Justice Ingraham written for the Appellate Division in the case of MacArdell against Olcott, reported 104 Appellate Division, 263, affirming the judgment entered of Justice Truax.

I further offer the opinion of Judge Hiscock and dissenting opinion of Judge Edward T. Bartlett in the case of MacArdell against Olcott, 189 N. Y., 368.

I further offer in evidence the opinion of the Supreme Court of the United States in

the case of Lawrence against the Southern Pacific Company, ~~228~~ U. S., page 127.

It is conceded that the following individuals are deceased and that they died prior to the institution of the present action:

Adrian H. Joline, Almon Goodwin, Ernest B. Kruttschnitt, Collis P. Huntington, Maxwell Evarts, Frederic P. Olcott, Herbert B. Turner and Henry Budge.

It is stipulated that Mr. Joline appeared in these litigations as counsel for Olcott and the Central Trust, and that Maxwell Evarts appeared as counsel for the Huntington executors. 440

It is stipulated that Walter B. Lawrence, the plaintiff in the suit in which the record has been offered in evidence and marked Exhibit F is the same Walter B. Lawrence who is the plaintiff's testator in the present action.

ANDREW K. VAN DEVENTER, being called by the defendant and having been duly sworn, testified as follows: 441

By Mr. Freedman:

I am an officer of the Southern Pacific Company, the defendant in the present suit. I am treasurer. I have been connected with the defendant company since 1881. I was elected assistant treasurer in 1901, and treasurer, I think, in 1906. My connection with the company prior to my election as assistant treasurer was that of clerk. The office of the treasurer of the Southern Pacific Company is at 165 Broadway, New York City.

442 Andrew K. VanDeventer—Direct Examination.

The Southern Pacific Company, to my knowledge, had an office for the transaction of business in the State of New York since its organization in 1884 or 1885, and to my knowledge there has been business of the Southern Pacific Company transacted at that office during that time.

443 My office has been at 165 Broadway since January, 1912, and prior to that time it was at 120 Broadway. It was at 120 Broadway from 1901 to 1912, up to the time of the fire in January, the 8th, 1912. 120 Broadway was known as the Equitable Building. The office prior to its being at 120 Broadway was at 23 Liberty Street. I think we went there in 1881.

Q. Generally, what records of the Southern Pacific Company were maintained at the New York office?

Mr. Gerber: That is objected to on the ground that you cannot prove records in that form.

Ruling reserved.

444 A. In the early part of the organization of the company there was not much more kept—that was in 1884, 1885, 1886—than a cash book, reporting payments and receipts, with coupons and bills for material equipment and that sort of thing, which was reported on abstracts to the San Francisco office, which was then the general accounting office of the company. Later on, in 1890, I think, the general books of the company were brought to New York and, of course all that pertained to the general accounting of the company went through those books. The Controller's office was established here on or about that time.

Up to the year 1890, the books which contained entries relating to payments in New York of money in connection with the business of the Southern Pacific Company were kept in New York and had record of everything that was paid there. Of course the San Francisco books had their own records of their own payments also. Subsequent to 1890 the books kept which contained the entries in connection with payments of the money in connection with the business of the Southern Pacific Company were kept in New York and San Francisco. There were no books, to my knowledge, kept in any other place than I have mentioned which contained entries of the payments of money relating to the business of the Southern Pacific Company, unless at the local agencies, where, of course, there were certain disbursements made at times. The books which contained the entries relating to the payments of money in New York were, to my knowledge, continuously in New York from 1890 to 1912. In 1912 they were destroyed by fire in the Equitable Building. There are no records now in existence, to my knowledge, or which I have been able to find or locate, which contain entries or copies of the entries or data relating to the entries, which were originally in the books which I have testified were destroyed. If there were any such books I would have knowledge of their existence or their whereabouts.

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Cross Examination by Mr. Gerber:

As to records in Texas in connection with the Texas Central Railroad matters so far as the Southern Pacific Company is concerned, the Houston & Texas Central have their own account

448 *Andrew K. VanDeventer—Cross Examination.*

books. Those account books show the transactions with the Southern Pacific Company. As to whether the same thing applies to the Southern Development Company, the Southern Development Company is not a Texas concern. I don't know where it is. As to the statement annexed to the answer, marked Exhibit A, I can't tell, I don't know where that statement was taken from.

449 Mr. Gerber: The statement to which I call the witness's attention is Exhibit A printed on page 131 of this record.

I verified that answer in behalf of the Southern Pacific Company. As to Exhibit B annexed to the answer, which I swore to, I don't know where I got the data for that exhibit. As to Exhibit C annexed to the answer, which I swore to, I don't know where I got the data for that exhibit. I do not know who prepared this exhibit.

450 Q. Do you know what books were resorted to in order to get the items set forth in Exhibits A, B and C annexed to your answer?

Mr. Freedman: That is objected to as assuming something not in evidence, there being no testimony that the exhibits were prepared from any books.

Ruling reserved.

A. I don't know.

I do not know what data, memorandum or papers were resorted to in order to get the complete Exhibits A, B and C annexed to my answer. I read the answer to which I swore. I looked at the exhibits annexed to the answer. I don't know whether I looked at them prior to to-day or not.

The books of the Morgan's Louisiana & Texas Railroad and Steamship Company are in New Orleans. The books of the Houston & Texas Central Railway Company, I presume, are in Houston, in the offices of the company. The books of the Houston & Texas Central Railroad Company are in Houston, Texas. I don't know where the books of the Southern Development Company are. I don't know whether or not the Southern Pacific Company ever filed a certificate in Albany allowing it to do business in this state; I don't know anything about it. The main office of the Southern Pacific Company prior to 1890 was in San Francisco. The main office of the Southern Pacific Company after 1890 was in New York City. Our bookkeepers in New York City got their information with respect to the business done by the railway company outside of the State of New York from San Francisco; all the documents and records as to the operation of the lines were all sent to San Francisco. First, statements were made up and abstracts of the business were then transmitted to New York. Those abstracts of the business which were transmitted from San Francisco to New York continued to be transmitted down to 1912. From 1890 to 1912 abstracts were sent on from San Francisco and transcribed in the books in New York. Those books were destroyed in the fire of 1912. I understand the question refers to the Southern Pacific Company. I did not personally handle the transcripts that came from San Francisco in connection with the entries made in the books at New York. I couldn't say how many different clerks made those entries. It was done through the controller's office by his clerks. As to who was the controller from 1890 to 1912—I am not certain

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454 *Andrew K. VanDeventer—Re-direct Examination.*

whether Mahl was made controller in 1890. He succeeded Mr. G. L. Lansing, whose headquarters were in San Francisco. Lansing died and Mahl succeeded him; he continued as controller until he retired about a year ago. I don't know how many clerks were acting under the controller in making these transcripts. I wasn't treasurer at that time. I became assistant treasurer in 1901. I became treasurer in 1906 or 1907; I am not sure which. My duties as treasurer or assistant treasurer did not require me to go over the books in charge of the controller.

455

Re-direct Examination by Mr. Freedman:

I had knowledge, however, of the general books and the existence of the books and the kind of books that were kept by the controller and his staff of employees. As to the books which contained the payments of cash by the Southern Pacific, that was always entered in a cash book in the treasurer's office, where all the transactions are recorded. I am not able to state whether the entries relating to the cash payments appeared in any books outside of the books that were at the New York office of the Southern Pacific Company. I testified on cross examination that I had no knowledge as to the source from which the items appearing on Exhibits A, B and C, annexed to the answer, were obtained. I did not have any knowledge at all about those exhibits before I verified the answer.

456

Q. Did anybody ever tell you the source from which those exhibits were compiled?

Mr. Gerber: That is objected to as hearsay and not evidence.

Ruling reserved.

A. I don't remember.

Q. Are you about to state whether the exhibits were prepared from books of the Southern Pacific Company at or after the time this answer was prepared?

Mr. Gerber: That is objected to on the ground that the witness has already said he did not know and couldn't tell.

Ruling reserved.

A. I don't know.

458

As to whether on the 30th day of October, 1913, there were any books of the Southern Pacific Company in existence which contained an account with the Houston & Texas Central Railway Company and an account with the Southern Development Company, there is and was then an account on the Southern Pacific Company's books with the Houston & Texas Central Railway Company. There was no book in New York in October, 1913, which contained an account of the Houston & Texas Central Railway Company with the Southern Development Company. There was no book, to my knowledge, in existence which contained such an account on that date. As to whether on that date there was any book in existence which contained a list of the notes due the Morgan's Louisiana & Texas Railroad and Steamship Company, notes payable by the Houston & Texas Central Railway Co., the Morgan's Louisiana & Texas Company books are in existence; those books are in New Orleans. As to whether there were any books in existence on October 30, 1913, which showed the payment of any moneys on account of the items appearing in Exhibits A, B and C, annexed to the answer, I am

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460 Andrew K. VanDeventer—Re-direct Examination.

unable to say as regards Exhibit A, the account of the Houston & Texas Central Railway Company and account with the Southern Development Company. I do not know whether the Houston & Texas books or the Southern Development Company books are in existence. I do not know anything about it. As to Exhibit B, Houston & Texas Central Railway Company notes due the Morgan's Louisiana & Texas Railway and Steamship Company, the Morgan's Company books are in existence. About the others I know nothing of their railway company. The same answer will apply to Exhibit C. I cannot state whether or not the cash books of the Southern Pacific Company contained items of payments of cash on account of the re-organization agreement of the Houston & Texas Central Railway Company. The books which I have testified were destroyed were the books which contained the entries relating to cash payments made by the Southern Pacific Company.

Re-cross Examination by Mr. Gerber :

462 The Southern Pacific Company books in New York, including the cash book, were made up as I have testified to on cross examination. The controller's office have prepared since the fire a duplicate set of books for the Southern Pacific Company to take the place of those destroyed, as near as possible.

Re-direct Examination by Mr. Freedman :

There have been no duplicate cash book or cash books of the Southern Pacific Company prepared. As to whether there is any book now in existence

that shows the payments in cash made by the Southern Pacific Company for the years from 1890 down to and including 1911 and up until the time of the Equitable fire, you will have to ask the controller; I don't know.

Defendant rests.

Mr. Gerber: We offer in evidence an exemplified copy of the will in probate proceeding leading to the probate of the will of Walter B. Lawrence.

464

The same was received in evidence and marked Exhibit 1.

HENRY FITCH, being called as a witness for the complainants and having been duly sworn, testified as follows:

By Mr. Gerber:

My business is that of clerk now. I was a stockholder for others of the Houston & Texas Central Railway Company in 1889. I was a stock broker and held stock for customers.

465

Q. Were you one of the committee of stockholders which was formed of certain stockholders of the Houston & Texas Central Railway Company?

Mr. Freedman: This is taken subject to my objection.

Ruling reserved.

A. Yes.

Q. Who constituted that committee?

Mr. Freedman: This is also subject to my objection.

Ruling reserved.

A. A. S. McClelland, A. B. Whittemore and myself.

467 I understand Mr. McClelland is dead. I believe Mr. Whittemore is alive; they say he isn't well; he is west. Among those stockholders of this committee represented there was Mr. S. W. Carey and Walter B. Lawrence and Cornelius MacArdell. That committee represented from 17,000 to 18,000 shares of stock of the Houston & Texas Central Railway Company. Russel H. Landale was one of the attorneys for that committee; also your firm, Dittenhoefer, Gerber & James. In connection with the litigations of Carey, MacArdell and Lawrence that was conducted for all the stockholders represented by this committee.

Q. Were contributions made for the expenses of that litigation by the various stockholders?

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Mr. Freedman: That is objected to as incompetent, immaterial and irrelevant.

Ruling reserved.

A. Yes.

Q. In connection with the Carey litigation, did Walter B. Lawrence contribute towards that?

Mr. Freedman. Same objection.

Ruling reserved.

A. Yes.

Q. Now, were there a number of assessments made upon these stockholders to pay the expenses of these various litigations to which your attention has been called?

Mr. Freedman: The same objection.
Ruling reserved.

A. Yes.

Q. Did Mr. Lawrence contribute his proportion of these expenses?

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Mr. Freedman: The same objection.
Ruling reserved.

A. Yes.

Q. Did you confer as a member of that committee with Mr. Lawrence in respect of these various suits that were brought, to which your attention has been called?

Mr. Freedman: The same objection.
Ruling reserved.

A. Yes.

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Q. I show you what purports to be an agreement of the minority stockholders of the Houston & Texas Central Railway Company appointing Richard B. Whittemore, Henry Fitch, Jr., of New York, and Andrew Simson McClelland, chartered accountant of Glasgow, Scotland, as a committee of stockholders of said company, and ask you whether that paper is the original agreement signed by the parties purporting to have signed it?

Mr. Freedman: The same objection.
Ruling reserved.

A. Yes.

The letter now shown me purports to be a letter signed by me bearing date December 7, 1889, purporting to have been written to R. H. Landale, Esq., authorizing him to act as attorney and employ counsel. That paper bears the signature of Mr. Whittemore, Mr. Fitch, two of the committee. The letter is in my handwriting.

Mr. Gerber: I offer the paper in evidence.

Mr. Freedman: That is objected to as incompetent, immaterial and irrelevant.

Ruling reserved.

The paper is received in evidence and marked Exhibit 2.

On looking at plaintiff's Exhibit 2, just offered in evidence, I can state this committee of stockholders was formed in 1889, previous to November, 1889. The paper now shown me is the original of the instrument purporting to be signed by the stockholders. That paper has no date, but was signed in 1889, about November.

Mr. Gerber: I offer this paper in evidence.

Mr. Freedman: I make the same objection.

Ruling reserved.

The paper is received in evidence and marked Exhibit 3.

Walter B. Lawrence was a member of the firm of Dick Brothers and Lawrence at that time. In Exhibit 3 Mr. McClelland signs for 2,200 shares, but as to whether included in that were stock-

holders other than himself I only know what he told me. He said he represented several stockholders. I know of my own knowledge that P. W. Gallaudet & Co., another subscriber to Exhibit 3, represented stockholders other than themselves. I don't know how many. They deposited 1,400 shares with the committee and it belonged to several different customers. Whether anyone else represented others than themselves and in addition to themselves I have no positive knowledge, only what they told me; that is all; what they told me when they deposited it. My own firm is P. W. Gallaudet & Company, to which I just testified. I know as to them. At the time of the signing of the Exhibit 3, Walter B. Lawrence delivered to me 200 shares of stock. He delivered them himself. He had possession of the certificate and delivered it to me. The committee had possession of all the stock that belonged to the subscribers specified in Exhibit 3. The agreement now shown me purporting to be an agreement of the minority stockholders appointing the same committee of which I was one, is the original of that agreement.

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Mr. Gerber: I offer this paper in evidence.

Mr. Freedman: That is objected to on the ground that it is incompetent, immaterial and irrelevant.

Ruling reserved.

The paper is received in evidence and marked Exhibit 4.

Q. Referring to Exhibit 4, which is dated September—1890, I will ask you whether all the stock set forth opposite the respective names of the par-

ties signing that paper was deposited with the committee?

Mr. Freedman: The same objection.
Ruling reserved.

A. Yes.

Q. Now, at various times, following the execution of Exhibits 3 and 4, were there meetings of these stockholders who had subscribed or signed these exhibits?

Mr. Freedman: The same objection.
Ruling reserved.

A. Yes.

Q. Did the committee report to these stockholders, at these meetings, the progress made in the various litigation? A. Yes.

Q. Was Mr. Lawrence present at those meetings? A. Yes.

Mr. Freedman: I make the same objection to all of this.
Ruling reserved.

Contributions were made by these various signers to this instrument to carry on these litigations. Mr. Lawrence contributed his proportion right down to his death. The selection of the parties who should act as complainants or plaintiffs in the various litigations directed by this committee was left to the counsel; you might say the committee in consultation with counsel. I kept in touch with these litigations as a member of this committee as to the progress made, and I conferred with counsel. I had frequent conferences

with Mr. Landale and with Judge Dittenhoefer, or Dittenhoefer, Gerber & James. I also had conferences with Mr. Chandler, one of the counsel at one of the stages of this litigation. The printed report of the committee now shown me purporting to be addressed to the minority stockholders of the Houston & Texas Central Railway Company and purporting to be signed by H. B. Whittemore, Henry Fitch, Jr., of committee, dated New York, February, 1895, was one of the notices sent out by the committee to the various signers to Exhibits 3 and 4.

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Mr. Gerber: I offer that in evidence.

Mr. Freedman: I object to it as incompetent, irrelevant and immaterial.

Ruling reserved.

The paper is received in evidence and marked Exhibit 5.

Another report now shown me, purporting to be to the minority association of the same company, and purporting to be signed by myself and Mr. Whittemore, of committee, was one of the forms of notices and report sent to all the members of the minority committee who signed Exhibits No. 3 and No. 4.

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Mr. Gerber: I offer the paper in evidence.

Mr. Freedman: I make the same objection.

Ruling reserved.

The paper is received in evidence and marked Exhibit 6.

Another report now shown me, purporting to have been made to the minority stockholders of the

same company, bearing date July 31, 1903, was one of the notices and report sent to the various signers of Exhibits 3 and 4.

Mr. Gerber: I offer that in evidence.

Mr. Freedman: I make the same objection.

Ruling reserved.

The paper is received in evidence and marked Exhibit 7.

These reports were sent to the various signers of plaintiff's Exhibits 3 and 4, including Walter B. Lawrence.

Cross Examination by Mr. Freedman:

I was a member of the firm of P. W. Gallaudet & Company. I have seen but don't know Mr. Michael Gernsheim. This committee of which I testified I was a member was brought into existence by the paper which has been marked Exhibit 3. That paper was the result of conferences with stockholders. The only records of its proceedings that were kept by the committee were reports that we made from time to time. We might say we did not keep any real records of the committee's meeting. There were no written records ever kept of the meetings of the committee. Mr. Whittemore was supposed to be the chairman, but there was no definite action taken in electing him chairman. There was never any action taken dissolving that committee. It still is in existence as far as I know. The committee at the present time are Mr. Whittemore and myself. There was never any action taken looking toward the election of a successor to Mr. McClelland. The plaintiffs or complainants

of the various suits were selected by the counsel to the committee in consultation with the committee. I do not mean by that that the counsel made a recommendation to the committee who took action on it. I think very likely the committee may have recommended them to counsel. It was a kind of mutual arrangement. The committee discussed with counsel fully the various steps which were taken in this litigation. The counsel to the committee rendered an opinion to the committee as to what the rights of the stockholders were who had deposited the stock with the committee. I think I have writings to that effect somewhere. I have not produced them here nor have I them with me. It is a fact that the rights of the stockholders who had deposited this stock was fully discussed by the committee with its counsel as to whether any report or notification was sent to the stockholders who had deposited this stock as to what their rights were, I don't know; I don't think so. I can't fix any time as to when this question of what the rights of the stockholders were was discussed. I don't know whether it was done before the Carey suit was instituted. There was a conference prior to the institution of the Carey suit by the committee with its counsel. I presume the rights of the stockholders who had deposited their stock were discussed at that conference. I think so. I don't know anything about such a conference regarding the Gernsheim suit. It is not my recollection that the bringing of the Gernsheim suit was not discussed by the counsel to the committee with the committee. I don't know anything about the Gernsheim suit; I wasn't interested in it. The plan of the reorganization of the Houston & Texas Railway Company was brought to the attention

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of the committee in 1889, I think. I think I personally knew of that plan before the committee was formed. I am not sure.

Q. Did these stockholders who deposited their stock with your committee take any action with reference to the payment of any moneys as called for under the reorganization agreement?

Mr. Gerber: To that I object.

Ruling reserved.

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A. Yes, Isaac Cromie paid the assessment of 73% of the Central Trust Company on 100 shares of stock. He, after the payment, made the statement he had paid it by mistake. I knew it was subsequently paid to him because I paid it to him myself. I don't know that the committee took any action as a committee with reference to the payment of any moneys after the plan of reorganization. I know that it didn't take any action. It must have had a conference or meeting with counsel relative to the payment of any moneys under the plan of reorganization. The result of that conference was that

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they decided not to pay any assessments. My committee knew that default had been made under the various mortgages which secured the issue of bonds on the Houston & Texas Central Railway Company. As to the statement in Exhibit 7: "Unless an appeal be promptly taken the stockholders will lose their last opportunity for redress." I cannot recall what the basis was or what led me to put that statement and use those words in the report that I sent to the stockholders. That paper and exhibit was prepared with the aid of counsel to the committee. As far as I know it had the approval and sanction of the counsel to the commit-

tee at the time the committee signed it. Mr. Lawrence was one of the stockholders who took an active interest in what the committee was doing. He was in frequent consultation with the committee as to what the committee was doing and what steps it was advising should be taken. He did not, as far as I know, ever lodge any dissent or express any dissent of any action or recommendation of the committee. I don't know that he expressed his approval of the different steps and actions which were taken by the committee and its counsel. He never talked with me as to what he considered the rights of the stockholders who had placed their stock with this committee. He never withdrew or attempted to withdraw his stock from the committee after he deposited it. He paid all the assessments made upon his shares of stock.

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Mr. Gerber: It is stipulated that the state of facts set forth in the agreed statement of facts, found on page 66 of the transcript of record, Supreme Court of the United States, in the case of Walter B. Lawrence, suing on behalf of himself, and so forth, against the Southern Pacific Company (Defendant's Exhibit F), continues to date, and that the facts as therein stated are correct, except that the amount of bonds outstanding in the hands of the public, under the Main Line and Western Division Consolidated Mortgage, was \$3,919,000 and not \$567,000 as therein set forth.

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Mr. Gerber: Plaintiff offers in evidence certificate or statement of the Secretary of State of the State of New York, bearing date May 8th, 1913, to the effect, that there has been no statement or designation filed by

the Southern Pacific Company, in the office of the said Secretary of State, nor has a certificate of authority to do business in this State been issued to said company.

497 Mr. Freedman: Objected to as incompetent, immaterial and irrelevant, the objection on the ground of incompetency not going to the extent that the evidence is not the best evidence, or that the statements made by the Secretary of State have not properly been certified to by him, and does not in any way relate to the form in which the proof is offered.

The paper referred to is marked Plaintiff's Exhibit 8.

RUSSELL H. LANDALE, called as a witness and having been duly sworn, testified as follows:

Direct Examination by Mr. Gerber:

I am an attorney-at-law and a member of the Bar of the State of New York. I was admitted to practice law in 1888, and have practiced law since in Virginia, Missouri, New York and Texas. I was present at the last hearing at which the witness Fitch testified. I heard his testimony. Mr. Fitch testified respecting a certain committee representing certain minority stockholders of the Houston & Texas Central Railway Company. I represented that committee from the time of its organization to the present day, and still represent it. It consisted of R. B. Whittemore, a member of the New York Stock Exchange, Henry Fitch, at that time a member of the New York Stock Ex-

change, Andrew S. McClelland, a member of the Scottish co-partnership who represented a large number of stockholders of the Houston & Texas Central Railway Company. That committee was selected by a number of minority stockholders of the Railway Company. Stephen W. Carey was one of the minority stockholders from the formation of this association of stockholders, from the very beginning; he was one of the original signers of the stockholders' agreement. Mr. Cornelius MacArdell was also a member and one of the original signers of the stockholders' agreement. Walter B. Lawrence also was an original signer of the stockholders agreement and remained a member to the time of his death. I have been thoroughly familiar professionally and otherwise with all the litigations connected with the Houston & Texas Central Railway Co., in which the stockholders were concerned. Throughout those ligiations down to the time of the death of Walter B. Lawrence, I had numbers of interviews with him respecting these litigations. He was a personal friend of mine besides being a client. He kept himself advised and informed through me respecting the various steps taken in the various litigations. From time to time, the committee of minority stockholders employed various attorneys in connection with the litigations conducted by them. In all these instances, the attorneys were employed by my advice. Such attorneys were, as well as I can remember, Jefferson Chandler, formerly of St. Louis, Messrs. Clark, Dyer & Bolinger, of Texas; Messrs. Dittenhofer & Gerber, of New York; Messrs. Battle & Marshall, of New York; Frederick R. Condert and the late Edward M. Shepard. I was in constant communication with Messrs. Dittenhoefer & Ger-

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ber during the Gernsheim litigation. When I speak of the Gernsheim litigation, I refer to the two suits, which, if I remember correctly, were for the purpose of setting aside assessments, first, the seventy-three per cent. assessment, and then the seventy-one 4/10ths per cent. assessment.

Q. Now, tell us Mr. Landale, why, out of these various stockholders that you represented and that the committee represented, you selected as plaintiff, Carey?

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Mr. Freedman: Objected to as incompetent, immaterial and irrelevant.

Ruling reserved.

A. I did not select only Mr. Carey, I selected some five or six stockholders at that time, on account of their representing the various stock interests among the committee.

Q. In the selection of the particular complainants in that suit, was that the result of conference between counsel as to the best and most advisable method of commencing that suit?

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Mr. Freedman: Same objection.

Ruling reserved.

A. It was.

Q. In making the selection of complainants, was the committee of stockholders consulted?

Mr. Freedman: Same objection.

Ruling reserved.

A. It was.

Q. And was Walter B. Lawrence advised respecting the commencement and the progress made in the Carey suit?

Mr. Freedman: Same objection.
Ruling reserved.

A. Yes.

Q. I mean, advised by you, of course?

Mr. Freedman: Same objection.
Ruling reserved.

A. Yes, he was advised by me and by my associate counsel.

Q. Now, take the MacArdell case, who selected the plaintiff in that suit? 506

Mr. Freedman: Same objection.
Ruling reserved.

A. The plaintiff was selected by the counsel representing the committee, after conference with the committee and with Mr. MacArdell.

Q. Had you spoken to Mr. Lawrence?

Same objection.
Ruling reserved.

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A. I had.

Q. So that in the conduct of the various litigations to which you have testified, do I understand that the selecting of the particular complainants or plaintiffs was simply a matter of counsel selecting the stockholders they thought most beneficial for the purposes of those suits?

Mr. Freedman: Same objection.
Ruling reserved.

A. The selections were made for that reason.

Q. And those suits were all representative suits, were they not, on behalf of other stockholders similarly situated?

Mr. Freedman: Same objection.

Ruling reserved.

A. Yes.

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I know that Walter B. Lawrence contributed toward the expenses of the various litigations to which I have testified. I know that he contributed to all of them. He was a regular subscriber to the committee, and not only subscribed his regular assessments, but paid various contributions besides.

Q. Is it not a fact that Walter B. Lawrence was one of the stockholders who was exceptionally active in connection with the prosecution of the various litigations to which you refer?

Mr. Freedman: Same objection.

Ruling reserved.

A. He certainly was.

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Walter B. Lawrence had to do with the formation of this association of stockholders and the selection of the committee. He was one of the gentlemen who met me in New York in 1889 and went over the entire Houston & Texas Central Railway matters, and then and there appointed the committee who in turn retained me.

The Carey litigation was commenced in the latter part of 1889, December 23rd, 1889. The amended bill was filed early in the next year in 1890.

An injunction was granted by Judge Bryant of Texas. That injunction was thereafter, in New

Orleans, set aside by Judge Pardee. There were various other motions made in the Circuit Court and before the different Judges of the Supreme Court in Washington. Those motions were prior to the trial before Judge Pardee. They were chiefly made for the purpose of preventing Judge Pardee trying the case. Justice L. Q. C. Lamar, Supreme Court Justice for the Fifth Circuit, at my instance and on my motion, notified Judge Pardee that he, Justice Lamar, would sit in the trial of the Carey case when it came up. Thereafter Justice Lamar died, and another motion was made before the Justice who succeeded Justice Lamar. He declined to interfere. The case therefore came up for trial and was heard by Judge Pardee, and the bill was dismissed. It was decided in November, 1892. Thereafter appeals were taken by us to the Supreme Court of the United States, and also to the United States Circuit Court of Appeals, which last named tribunal had been created that year. This was done because counsel were undecided as to whether the right of appeal was to the Supreme Court or to the United States Circuit Court of Appeals. Two complete copies of the record were prepared and filed in each of these appellate courts. Various other motions were made in Washington by counsel for the minority stockholders. When I refer to Washington, I mean the Supreme Court of the United States, before a Justice of the Supreme Court in Chambers. The first appeal to the Supreme Court was submitted in October, 1893, and the Court decided it had no jurisdiction and dismissed the appeal, in November, 1893. In 1894, the case on appeal to the United States Circuit Court of Appeals came up for argument. The Circuit Court of Appeals consisted of two District

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Judges and the new Circuit Judge, Judge McCormack. After hearing, it was determined adversely to the minority stockholders, in June of that year. From that court it was determined to take an appeal to the United States Supreme Court, and again the record was filed in the Supreme Court of the United States. The case was submitted in December, 1895, and the Supreme Court of the United States decided that it was without jurisdiction and dismissed the appeal in March, 1896.

The MacArdell suit was commenced in August, 1891. It was noticed for trial in December, 1891, appeared on the calendar in February, 1892, and thereafter was adjourned from time to time until May, 1894, when it was reserved generally. It was subsequently noticed for trial, and appeared on the trial calendar in October, 1901. Motion was made to bring in the Huntington executors in December, 1900, and granted in January, 1901. Various other motions took place, and in 1902 the trial, lasting five days, was had. Briefs were submitted in July, 1902, and the complaint was dismissed June 16, 1903. The case on appeal was submitted for settlement in 1904, and settled March 3, 1904.

The case on appeal was filed in the Appellate Division on October 27th, 1904, appeal argued April, 1905, and the judgment of the lower Court affirmed in May, 1905. Defendants in that suit moved to vacate judgment of the Appellate Division and new judgment was entered *nunc pro tunc*, July, 1905. Return filed in the Court of Appeals in August, 1905. Motion to amend order of Appellate Division argued in Court of Appeals and decided in favor of the appellants, January, 1907. Case argued in the Court of Appeals, May, 1907. Judgment rendered by the Court of Appeals against the appellants, October, 1907.

Q. Now, while both the Carey and MacArdell cases were pending, was not it deemed advisable by counsel to await the trial of the MacArdell case until the Carey case was finished?

Mr. Freedman: Objected to as incompetent, immaterial and irrelevant.

Ruling reserved.

A. It was.

Q. Pending the carrying on of the Carey litigation, was the MacArdell case pressed to trial by counsel, either by plaintiff or defendants?

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Mr. Freedman: Same objection.

Ruling reserved.

A. It was determined that it was useless to try the MacArdell case until the Carey case was finally decided, as, in the event of the stockholders winning the Carey case, there was nothing left in the MacArdell case; that is to say, there wouldn't be anything to try in the MacArdell case. If the stockholders set aside the reorganization and took possession of their own railroad, there was nothing left of the MacArdell case. In that, I may say, counsel for both sides practically agreed. In respect of reserving the case, there was no objection on the part of the defendants to that course to my knowledge.

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Q. Now, in that case, is it not also a fact that counsel made ineffectual efforts in the MacArdell case to agree upon a statement of facts respecting the records in Texas?

Mr. Freedman: Same objection.

Ruling reserved.

A. It is certainly true that I myself spent the best part of two years in constant negotiations with Mr. Tweed and with Mr. Joline and other counsel, in endeavoring to arrange for various documentary evidence and stipulation as to the testimony of various parties. If I remember correctly, these years were 1898 and 1899. I desire to say in this connection, that I found from examination of my records that I had constant and repeated interviews, principally with Mr. Tweed, who was at that time chief counsel for the Southern Pacific Company.

I recall that Mr. Gerber prepared a proposed stipulation covering the facts that counsel were endeavoring to agree upon. That stipulation was prepared by Mr. Gerber, and to my certain knowledge was signed by Mr. Tweed, but in some way the signed copy was lost, between our various offices, and the resigning of that stipulation was the chief trouble that Mr. Joline and I had at that time. By trouble I mean, there was no difference of opinion in the matter, but we had constant interviews with Mr. Tweed, as both Mr. Joline and I were equally desirous that the various stipulations should be signed. The difficulties were always

with Mr. Tweed. We never could get them resigned. After our inability to get this stipulation resigned for use on the trial in the MacArdell suit, I was obliged to and did have the Clerk of the United States Circuit Court at Galveston prepare and certify, for the purposes of evidence in New York, the entire record in the Consolidated case No. 198, which is the foreclosure suit of the Houston & Texas Central Railway Company, and this took many months to do. That record covers about 1,000 printed pages of the MacArdell record (being Plaintiff's Exhibit 3). In gathering together these

various records for certification, I took, I should say, several months, and then probably underestimate it. As to the cost of that certification I am rather in the dark. It was \$2,000 or \$3,000, I believe—some thousands of dollars, I don't know just how much. It was in respect to this record that these negotiations were carried on so long concerning the stipulation to which I have testified, for the reason that the record as it came up contained a vast mass of useless matter for either party, and if the stipulation which Mr. Joline and myself wished to have signed had been signed we could have cut that record down one-third.

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I have told you that the McArdell judgment was affirmed in the Court of Appeals October 29, 1907. The Lawrence suit, concerning which I have testified, was begun in February, 1908. Its chronological history is as follows: The summons and complaint were served in February, 1908; time of defendants to answer extended until April; case removed to United States Circuit Court in April; motion made to remand; same denied November 28th; defendants filed plea of non-jurisdiction December 15th; second motion to remand was argued February, 1909; motion to revive against Olcott's executors; motion was thereafter withdrawn; motion was made by defendants to dismiss the complaint by reason of the death of the defendant Olcott, and the failure to revive the same against his executors; this motion was denied March 14, 1910; agreed statement of facts on plea, March 4, 1910; plea argued March 25 and decided against plaintiffs July 29; appeal to United States Supreme Court perfected October 1, 1910; notice of motion served by appellants to advance the cause on the calendar of the United States Supreme Court, January,

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1911; defendants oppose motion; same denied, with leave to submit printed briefs February 20, 1911; another motion was made to advance by the appellants and was submitted on printed briefs, in November, 1911; opposed by appellees and the motion denied, November, 1911; case reached in due course and argued on March 5, 1913; appeal dismissed April 9, 1913.

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The present suit was commenced July, 1913. The present action was brought in the State Court and was removed by the defendants to the United States District Court for the Eastern District of New York, thereafter. The answer of the defendant was not served until November, 1913, after the removal.

Cross Examination by Mr. Freedman:

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The nature of the Carey suit and the grounds on which it was brought were discussed with the minority stockholders' committee. I believe it was discussed with Mr. Walter B. Lawrence. The nature and the ground upon which the MacArdell suit was brought were discussed with the minority stockholders' committee. I don't know whether it was also discussed with Mr. Walter B. Lawrence; I am perfectly certain that he read over the complaint, however. The kind of relief that was asked for in the Carey suit was discussed with the minority stockholders' committee, and with Mr. Walter B. Lawrence in a general way. I think the nature of the relief demanded in the MacArdell suit was also discussed with the minority stockholders' committee. Mr. Walter B. Lawrence read the bill or the complaint in the suit. He read every document of that sort that was ever printed or prepared. I believe Mr. Lawrence was present at the

trial of the MacArdell suit, during part of the trial, certainly for one or two days I think he was present, but not the Carey case. The nature of the Gernsheim case and the grounds upon which that suit was brought were discussed with the minority stockholders' committee, and the case was explained to them by me. The minority stockholders' committee had nothing whatever to do with the bringing of the Gernsheim suit. That was brought, if I remember correctly, before this committee of stockholders was created, by Mr. Gernsheim, because I met Mr. Gernsheim on my first visit to New York in 1899. The counsel in that case was Dittenhoefer & Gerber. I don't know who paid the expenses of it. The minority stockholders' committee never contributed any moneys toward the prosecution of the Gernsheim suit. The minority stockholders were in complete accord and sympathy with Mr. Gernsheim's suit. I believe his suit was also a representative action, so-called. The minority stockholders' committee discussed intervening in the Gernsheim suit. The only step they took toward intervening was my employment of Mr. Gernsheim's attorneys as our attorneys. They took no other step toward intervening. I mean that after the Gernsheim suit was started and the stockholders' committee formed, that the counsel for Mr. Gernsheim was associated as counsel for the stockholders' committee, associated with myself and Mr. Chandler. They were associated at the time the Gernsheim litigation terminated. In further explanation of my answer I would say, that the Gernsheim litigation, if I remember correctly, was more or less an attack on the assessments levied by the Central Trust Company. I and my associate counsel deemed it proper to attack on a different line.

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After that the Gernsheim attorneys and ourselves joined forces. I know that the relief asked for in the first Gernsheim suit was in hostility to carrying out the plan of reorganization. Mr. Carey was not the only one selected to bring the suit which was afterwards brought in his name. The others that were selected were Warren S. Sillocks, J. Van Schaick, D. P. Ingraham, Jr., James Landale, George Wilson and Andrew S. McClelland. The last three plaintiffs were my father, who died some years ago, George Wilson, my uncle, who died some years ago, and Andrew S. McClelland, the other Scottish member of the committee. These last three of the plaintiffs represented the foreign contingent; the others represented the American. I think I have enumerated in my direct examination all of the litigation and suits that were brought on behalf of the minority stockholders of the Houston & Texas Central Railway Company. I do not know of any suit or proceeding that was taken on behalf of the minority stockholders of the Houston & Texas Central Railway Company, in which the Southern Pacific Company was a sole defendant, prior to the bringing of the present suit. I testified that during the pendency of the MacArdell suit and prior to its trial, counsel for both sides agreed that it was useless to go on with the MacArdell suit. When I say that counsel agreed, I mean that we had several conferences, I on my part with counsel for the other side, and with Dittenhoefer and Gerber, and all of us appreciated the fact that if the Carey case was won by the minority stockholders, and the relief asked for therein granted, there would be nothing left to be done in the MacArdell case at all, and the minority stockholders would have won everything that they wanted. I don't know that, in fact I and

by associates representing the minority stockholders suggested the futility of prosecuting both suits at the same time. I don't know what arrangements were made about that, because I think I was more interested then in the Carey case and was probably in Texas. I spent most of the time there. I presume the counsel for the minority stockholders were anxious to save the expense of the two trials if the second were unnecessary, but I don't know who the initiative came from. I am not willing to state because I don't know, that counsel for the defendants in the MacArdell suit ever asked counsel for the complainant not to go with the trial of that suit. I don't know when Mr. Huntington died. I think he died some time in the year 1900.

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Re-direct Examination by Mr. Gerber :

As to certain papers offered in evidence when Mr. Fitch was upon the stand, which purported to set forth a list of stokholders and stockholdings of the minority stockholders, as we have termed them here, I know that, in addition to that list and those names, there were other stockholders who were in sympathy with the minority stockholders represented by the committee. Some five thousand shares more. The committee represented approximately eighteen thousand shares, and I think that in the paper submitted by Mr. Fitch there were only some thirteen thousand shares signed up.

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Re-cross Examination by Mr. Freedman :

The whole number of stockholders, whose shares approximated about eighteen thousand, all con-

538 Russell H. Landale—Re-cross Examination.

tributed ratably to the expenses of the litigation and proceedings which were taken on behalf of the minority stockholders, and some of them contributed more than ratably.

Re-direct Examination by Mr. Gerber:

Among those who contributed more certainly was Walter B. Lawrence.

539 Re-cross Examination by Mr. Freedman:

Some of the minority stockholders who cast their lot with the committee, delivered certificates of stock to the committee. The committee still has those certificates of stock in safe keeping. There was no assignment executed on the back or in relation to any of the stockholders' certificates lodged with the committee. I think some of the certificates may have been in negotiable form, and others may not have been, I don't know about that.

Complainants Rest.

Defendant's Exhibit A on Trial of 541
Separate Defenses.

(NOTE.—This exhibit consists of the bill of complaint in this cause and is not here printed for the reason that it is printed in full at pages 3 to 57 of this record.)

Defendant's Exhibit B on Trial of
Separate Defenses.

(NOTE.—This exhibit consists of the printed record in the cause of Carey vs. Houston & Texas Central Ry. Co. on appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and is not here printed for the reason that, under the order printed at pages 477 and 478 of this record the same, and the five opinions in connection therewith, are to be handed up on the argument of this cause.) 542

Defendant's Exhibit C on Trial of 543
Separate Defenses.

(NOTE.—This exhibit consists of the printed record in the cause of Gernsheim vs. Olcott on appeal to the General Term of the Supreme Court of New York for the First Department, and is not here printed for the reason that, under the order printed at pages 477 and 478 of this record, the same, and the two opinions in connection therewith, are to be handed up on the argument of this cause.)

544 **Defendant's Exhibit D on Trial of
Separate Defenses.**

(NOTE.—This exhibit consists of the printed record in the cause of Gernsheim vs. Central Trust Company on appeal to the General Term of the Supreme Court of New York for the First Department, and is not here printed for the reason that, under the order printed at pages 477 and 478 of this record, the same, and the opinion in connection therewith, are to be handed up on the argument of this cause.)

545

**Defendant's Exhibit E on Trial of
Separate Defenses.**

(NOTE.—This exhibit consists of the printed record in this cause of McArdell vs. Olcott on appeal to the New York Court of Appeals, and is not here printed for the reason that, under the order printed at pages 477 and 478 of this record, the same, and the two opinions in connection therewith, are to be handed up on the argument of this cause.)

546

**Defendant's Exhibit F on Trial of
Separate Defenses.**

(NOTE.—This exhibit consists of the printed record in the cause of Lawrence vs. Southern Pacific Co., on appeal to the United States Supreme Court and is not here printed for the reason that, under the order printed at pages 477 and 478 of this record, the same, and the opinion in connection therewith, are to be handed up on the argument of this cause.)

547

**Complainants' Exhibit 1 on Trial of
Separate Defenses.**

(NOTE.—The exemplification of this Exhibit is omitted herefrom.)

I, Walter B. Lawrence, of Flushing, New York, declare that this is my last will and testament, and I revoke all other wills by me at any time heretofore made.

I give and devise to my son Townsend Lawrence, his heirs and assigns forever, my homestead at Flushing, whereon I now reside, together with the appurtenances, including all the land bounded on the north by land of the Long Island Railroad Company, on the east by Lawrence Avenue, on the south by land late of Henry A. Bogert, deceased, and on the west by Flushing creek; and I give and bequeath unto my said son, Townsend, all the contents of the dwelling and other buildings on said premises, except the silver, glass and china; and I give and bequeath the said silver, glass and china to my said son Townsend, and to my daughter, Anita Lawrence, in equal shares. 548

I give and bequeath to my said daughter, Anita Lawrence, the sum of fifty thousand dollars, as an offset to the homestead devised to my said son. 549

All the rest, residue and remainder of my estate and property, real and personal, I give, devise and bequeath in equal shares to my said son and daughter absolutely.

I nominate, constitute and appoint my said son, Townsend, my said daughter, Anita, and my nephew, Henry L. Bogert, to be the executors of this, my last will and testament, authorizing them, or such of them as shall qualify and act as such executors, to sell any part of my real or personal property, except such as is hereinbefore specifically

Complainants' Exhibit 1.

550

devised or bequeathed, for the purpose of dividing my estate or to benefit it otherwise, in their discretion, and to execute the necessary deeds and other instruments of transfer.

In witness whereof I have hereto set my hand and seal this eleventh day of August, in the year nineteen hundred and five.

W. B. LAWRENCE [L. S.]

551

Signed, sealed, published and declared by the testator as and for his last will and testament in our presence, and we, at his request and in his presence, and in the presence of each other, have hereto set our names and residences as subscribing witnesses.

Henry L. Bogert residing at 87 Maple Ave. Flushing
Henry L. Bogert, Jr. " " " " " "

552

I, Walter B. Lawrence, of Flushing, in the Borough of Queens, County of Queens, City and State of New York, do hereby declare and publish the following as and for a codicil to my last will and testament, which bears date the Eleventh day of August nineteen hundred and five and which I do hereby reaffirm and republish in all respects, except in so far as it is altered or modified by this codicil.

Inasmuch as I am now pursuing and carrying on an action in the United States Courts as plaintiff on my own behalf and on behalf of certain old stockholders of the Houston and Texas Central Railway Company against the Southern Pacific Railway Company, and desire to provide for the continuance of such action and the litigation connected therewith and supplementary thereto, with-

out interference or cessation by reason of my death before the termination or final adjustment thereof; now, therefore, I do hereby authorize the executors of my said last will and testament and of this codicil thereof and of any other codicil thereto, and I hereby empower and direct them, or such of them as shall act and undertake the burden of carrying out my testamentary wishes, and their successors, to carry on, continue, revive, reinstate, adjust, compromise and complete the said litigation, or any part thereof, and to change or make and complete any necessary or desirable substitution of method or form or substance, according to their judgment or discretion; and to that end I also authorize and empower them and their successors to execute, acknowledge and deliver any and all instruments in writing, with or without seals, in order to carry out and effectuate the matters and things hereinbefore mentioned, in person or by attorney.

554

In witness whereof I have hereunto set my hand and seal this 8th day of March, in the year nineteen hundred and eight.

WALTER B. LAWRENCE (Seal)

Signed, sealed, published and declared by the testator as and for a codicil to his last will and testament in our presence, and we, at his request and in his presence and in the presence of each other, have hereto subscribed our names and places of residence, as attesting and subscribing witnesses.

555

March 8th, 1908.

TOWNSEND LAWRENCE,

319 Fifth Ave.

N. Y. City.

ROBT B. LAWRENCE,

44 Sanford Ave.,

Flushing, N. Y.

**556 Complainants' Exhibit 2 on Trial of
Separate Defenses.**

P. W. GALLAUDET & CO.
Bankers
Commercial Paper, Stocks & Bonds,
United Bank Building,
Wall St. Cor. Broadway.

Henry Fitch, Jr.,
Member N. Y. Stock Exchange.
New York, Dec. 1st, 1889.

557 R. H. Landale, Esq.,
Dear Sir:

Acting by virtue of the agreement entered into between certain stockholders of the Houston & Texas Central Railway Co. a copy of which is hereto attached, we hereby authorize you to act as our attorney in this matter, to employ such counsel and take such steps as may be deemed necessary for the protection of the interests of said stockholders. It is hereby understood, however, that we shall not be held liable for an expense greater than three thousand (\$3000) dollars, unless by special agreement made hereafter.

558

R. B. WHITEMORE,
HENRY FITCH, JR.,
Committee.

It is hereby specially agreed that the sum of \$3000—mentioned herein be increased to \$4,000.
N. Y., July 1st, 1890.

HENRY FITCH, JR.,
of Com.

**Complainants' Exhibit 3 on Trial of
Separate Defenses.**

559

We, the undersigned holders of Capital Stock of the Houston & Texas Central Railway Company do hereby appoint RICHARD B. WHITEMORE and HENRY FITCH, JR., of New York, and ANDREW SIMPSON McCLELLAND, Chartered Accountant, of GLASGOW, SCOTLAND, as a Committee of the Stockholders of said Company, and we do hereby authorize said Committee to employ Counsel and take such action, either by negotiation, litigation, or otherwise as they may deem advisable for the protection of our interests as Stockholders of said Company.

560

And we do hereby agree to pay to the said Committee for the purpose of employing Counsel and of defraying any other necessary expenses, the sum of Fifty Cents per share on each share set opposite our names.

N. Y., Nov. 30th, 1889.

NAMES	NO. OF SHARES	
A. S. McClelland for Jas. Landale.....	100	
“ “ Hugh Neilson's Trustees	300	561
A. S. McClelland.....	2200	
Van Schaick & Co.....	500	
Julius A. Kohn.....	700	
S. W. Carey by Whittemore, Musgrave & Hill	900	
Warren S. Sillocks.....	1000	
R. W. Gallaudet & Co.....	1400	
J. L. Blanco by Whittemore, Musgrave & Hill	100	
Dick Bros. & Lawrence.....	200	
Mary Jane Gillett by J. A. McMicken.....	100	

562

Complainants' Exhibit 4.

P. J. Goodheart & Co.....	100
D. P. Ingraham, Jr.....	200
C. Macardell	309
Francis P. O'Reilly by H. F. Jr.....	200
Francis P. O'Reilly Trustee by H. F. Jr..	1000
William French by H. F. Jr.....	207
Lathrop Smith & Oliphant.....	700
Chas. E. Breeden.....	200
R. L. Niles.....	100
Leonard Scott	100
Alex. Goring	160
Isaac Cromie	100

563

**Complainants' Exhibit 4 on Trial of
Separate Defenses.**

**THE HOUSTON & TEXAS CENTRAL RAIL-
WAY COMPANY.**

Agreement of Minority Stockholders:

564

WHEREAS certain of the bondholders of the Houston and Texas Central Railway Company have attempted, together with the directors and officers of said Railway Company, to reorganize the same in the interest of the Southern Pacific Company and to the great detriment and loss of the stockholders of said Houston and Texas Central Railway Company; and

WHEREAS the majority of stock in said last named Company is owned and controlled by the Southern Pacific Company whose interests are hostile and inimical to those of the minority stockholders of said Houston & Texas Central Railway Company, and it is evident that the aforesaid reorganization is merely a scheme to confiscate the stock of said minority holders; and

WHEREAS an agreement bearing date November 20th, 1889, has been made and entered into by and between certain stockholders of the Houston & Texas Central Railway Company, whereby R. B. Whittemore and Henry Fitch, Jr., of New York, and Andrew S. McClelland of Glasgow, Scotland, have been appointed a committee of said stockholders, and authority vested in them as a committee to employ counsel and take such action, either by negotiation, litigation or otherwise, as they may deem advisable for the protection of the interests of the stockholders entering into said agreement; and

566

WHEREAS for the mutual protection of the interests placed in the hands of said committee, the subscribing stockholders have deposited with said committee their stock in said Railway Company; and

WHEREAS it is desired that the powers of said committee be more clearly limited and defined, and a continued, united and systematic defence of said stock be insured, and ample provision be made for defraying the expenses of any negotiation, litigation or other action determined on by said committee;

567

NOW, THEREFORE, we the undersigned stockholders of the Houston & Texas Central Railway Company, as a part of said former agreement, and in continuation of and connection with the same, do hereby agree:

FIRST.—That said committee be and it hereby is constituted our agent with full power to act for us and in our behalf in all matters pertaining

to and in connection with said stock deposited in its hands, and with power to transfer the same whenever necessary to carry out and execute the provisions of this agreement.

569

SECOND.—That in order to provide and pay for the preservation and defense of said stock by negotiation, litigation or other action deemed advisable by said committee, and to provide means for securing the services of attorneys and counsel and others and for defraying the necessary expenses of such negotiation, litigation or other action, we hereby authorize said committee to use and devote an amount of our said stock not to exceed twenty-five per cent. of the same to the above purposes, and we hereby waive all right, title or claim to any amount of said stock within said limit that said committee may use and devote to said purposes by agreement, contract or otherwise, in order to carry out the terms and provisions of this agreement.

570

THIRD.—That in the event any member of said committee be incapacitated from further action thereon, a successor shall be immediately chosen from amongst the subscribing stockholders by the remaining members of said committee, and notice of the change shall be duly given to the subscribing stockholders; and it is hereby agreed that all successors so appointed shall be vested with similar powers already conferred on the present members of the committee.

FOURTH.—That we agree to aid and assist said committee whenever called upon by it to do so in the furtherance of this agreement, provided, however, that our individual liability shall not

in any event exceed the limit herein set forth, to wit, twenty-five per cent. of our subscribed stock.

New York, September , 1890.

Names	AMOUNT OF STOCK.	
P. W. Gallaudet & Co.	1400	Shares
Warren S. Sillcock	1000	"
Anthony J. O'Reilly	100	"
Munsky & Caprielle	300	"
Stephen W. Carey	950	"
Louis C. Stratemeyer	100	"
José L. Blanco	100	"
Theodore Wilson	100	"
C. Macardell	509	"
Francis P. O'Reilly, Trustee	1000	"
Francis P. O'Reilly	200	"
William French	200	"
Dick Bros. & Lawrence	200	"
P. J. Goodhart & Co.	100	"
Gregory Ballon & Co.	100	"
Turner Manuel & Co.	300	"
Irving H. Brown	100	"
Siegef. Gruner & Co.	1800	"
Otto Arens	1200	"
James Landale	100	"
Van Schaick & Co.	500	"
A. Kohn	700	"
Chas. E. Breeden	200	"
Danl P. Ingraham Jr.	200	"
Mary J. Gillett	100	"
C. Macardell	100	"
Lathrop, Smith & Oliphant	1800	"

572

573

574 **Complainants' Exhibit 5 on Trial of
Separate Defenses.**

TO THE MINORITY STOCKHOLDERS OF THE HOUSTON
AND TEXAS CENTRAL RAILWAY COMPANY:

575 GENTLEMEN—Your Committee begs to report as follows: On December 27th, 1889, a suit was begun in the United States Circuit Court at Galveston, Texas, for the purpose of having declared null and void the foreclosure decree entered in the same court on May 8th, 1888, by which the railway and vast land grants of the Houston and Texas Central Railway were ordered to be sold. This suit brought in your behalf is known as the Carey case, and has occupied a prominent place in the United States Courts for over five years.

The bill of complaint filed in the Carey case was demurred to by the various defendants, but finally they concluded that they must answer and defend, so the demurrers were withdrawn and answers filed.

576 A vast amount of testimony was taken by both sides in New York and in Texas, and the case came on for trial in May, 1892, before Judge Don A. Pardee, who was the same Judge who signed the foreclosure decree sought to be attacked and nullified in the Carey case. After hearing an exhaustive argument on both sides, Judge Pardee decided the case against the stockholders. In his opinion he argues that, as his decision would not be taken as a finality, he need not elaborate on the questions at issue; that his Court had jurisdiction to entertain the foreclosure proceedings and to enter the decree attacked. He sought in every way to excuse his foreclosure decree and to belittle the stockholders' present proceeding, stating that they

were really benefited by the foreclosure instead of being wronged and defrauded. He made no attempt to defend the foreclosure of mortgages amounting to over \$17,000,000, which were not due, and said: "The question of whether or not the principal of the bonds secured by the First Main Line and Western Division mortgages was or had become due because of the default of the company and its general failure to comply with its agreements, was, it is true, an issuable fact, but at the same time it was a fact of minor importance, etc." After elaborating on the imaginary benefits the stockholders had received on account of the foreclosure, and the reorganization scheme of which the foreclosure was a part, he dismissed the complaint (52 Fed. Rep., p. 261).

578

Our counsel immediately took two appeals from Judge Pardee's decision—one to the Supreme Court direct and the other to the new Circuit Court of Appeals, it being uncertain which of these appellate Courts had jurisdiction to hear the appeal. The appeal to the Supreme Court was argued in October, 1893, on a motion to dismiss, and the Supreme Court decided that the appeal properly lay to the Circuit Court of Appeals at that time and dismissed the appeal to the Supreme Court (150 U. S., p. 170). Whilst this appeal was pending, there were argued in the Supreme Court several motions for injunctions, a writ of prohibition and other relief.

579

After the decision of the Supreme Court, the defendants moved in the Circuit Court of Appeals to dismiss the remaining appeal, but were defeated, the Court declining to grant their motion; and, in April, 1894, the appeal was argued before Circuit Judge McCormick and two District Judges. The

argument took two days, and resulted in the appellate Court affirming Judge Pardee's decision.

The decision is as follows:

581

"Concurring in the views of the learned Judge, "expressed in his opinion in the Court below, and "being satisfied of the jurisdiction of the Court in "the suit in which the decree of foreclosure and "sale was rendered, as the property was in the "actual possession of the Court, and that no benefit or advantage could come to the complainants "by the reversal of the judgment rendered, or by "any different one that could be rendered at this "time, we consider that the decree of the Court "below should be affirmed with costs, and it is so "ordered."

582

You will note that the Appellate Court carefully avoids determining any of the important points in the case (the citizenship question is unimportant, even if the Court correctly decides it, which our counsel maintain is not the case). The Court decides that no benefit could come to the stockholders by reversing Pardee's decision; but whether the stockholders are benefited or not is a matter for them to decide; and, if the foreclosure decree is irregular, illegal and void for any of the reasons alleged by the stockholders, it is the bounden duty of the Court to so declare.

Judge Pardee left the question as to the legality and validity of the foreclosure of the mortgages before they were due, to the higher Court, and that Court has not passed on the question.

Judge McCormick has been applied to and has stated that he will grant an appeal to the Supreme

Court, and our counsel, consisting of Hon. Jefferson Chandler, of Washington; Hon. George Clark, of Texas, and Judge Dittenhoefer and R. H. Landale, Esq., of New York, are unanimous in the belief that in the Supreme Court, with the Carey case properly appealed there, the stockholders will, for the first time, obtain justice.

The funds of your Committee are now exhausted, and there is no market for the stock which could be used to replenish the treasury, so that a request is necessary to the stockholders for a subscription with which to carry the case to the Supreme Court and get a decision from that Court on the merits of the case.

584 .

The necessary costs and fees in the Supreme Court will amount to about \$1,500, and those of the Clerk of the Circuit Court of Appeals are some \$1,500, but this latter charge may be reduced to about \$150, if our counsel can get from the Treasury Department a ruling that the Clerk need not make certain charges, and if Judge McCormick will grant an order on said ruling. At any rate, your Committee feel that it is essential they should raise the maximum amount required, and this can readily be done on a subscription of one-quarter of one per cent. of the stock held by the minority stockholders.

585

We would add that the amount of these charges is caused by the immense size of the record, containing, as it does, over 1,400 pages of printed matter, statements, statistics, court orders, testimony, and the like.

Please send check to R. B. Whittimore, 35 Broad street, New York, for \$25, that being the

Complainants' Exhibit 5.

586

amount of subscription of one-quarter per cent.
on the stock held for you by the Committee.

Very respectfully submitted,

R. B. WHITTIMORE,
HENRY FITCH, Jr.,
of Committee.

New York, February 18, 1895.

587

**Complainants' Exhibit 6 on Trial of
Separate Defenses.**

TO THE MINORITY STOCKHOLDERS OF THE HOUSTON
& TEXAS CENTRAL RAILWAY COMPANY:

Gentlemen:

Your Committee begs to report as follows:

588

The appeal in the Carey case having been dismissed by the Supreme Court of the United States on the ground that said Court had no jurisdiction to entertain an appeal in said case from the decision of the United States Circuit Court of Appeals, meetings were held by the minority stockholders at which the counsel for the stockholders were present, and the condition of the litigation in connection with your company discussed and considered.

Your Committee finds that the vast land grants amounting to something over four million six hundred thousand acres belonging to your company have never been turned over to the new railroad company, and that Frederic P. Olcott, who acted as purchaser under the plan of re-organization of

the old Houston & Texas Central Railway Company, continues to hold title to all these lands in his own name. Your counsel contend in view of all the circumstances, that said lands are held by Mr. Olcott as trustee for the benefit of the stockholders of the old Houston & Texas Central Railway Company.

Counsel both in New York and in Texas are of the opinion that under the law of this State, as well as the law of the State of Texas, these lands can be reclaimed for the benefit of the stockholders of the Houston & Texas Central Railway Company and that neither Frederic P. Olcott, nor the new railroad Company, has any right or title to them whatever.

590

Mr. Olcott claims to have purchased these lands, together with the railway properties, under the decree of foreclosure, pursuant to the plan of reorganization. When the new company was formed, the other railway properties were conveyed by Mr. Olcott to the new company, but he retained possession of all the land grants, as the new company, under the Constitution and Laws of the State of Texas, was and is incapacitated from receiving or owning any lands excepting such as are necessary in the use and operation of the railroad.

591

A suit is now pending in the Supreme Court of the State of New York in which the court is asked to declare Mr. Olcott a trustee for the old company, to compel him to render an account of all sales made by him of said lands, and to appoint a receiver to hold the undisposed of lands for the benefit of the stockholders. In addition to this suit it is deemed advisable to commence a suit in

592

the State courts of Texas to reclaim the lands for the stockholders.

The case in the New York Supreme Court, we are advised, is in a position to be tried at an early date. Your Committee has considered the probable expense of taking both cases to the highest court in each State, and finds that the amount required will not be large, as the cost of carrying on appeals in the State courts is very much less than in the Federal courts.

593

Your Committee believes that you will agree to continue an active opposition to the complete consummation of one of the most flagrant cases of American railway wrecking, and has determined on asking for a contribution of twenty cents a share, which will provide a fund amply sufficient to carry on the litigations mentioned.

It is therefore desired that you send to the undersigned, 35 Broad Street, New York City, a check for \$40.00, that being the amount of contribution on the stock held for you by this Committee.

594

Very respectfully submitted,

R. B. WHITTEMORE,
HENRY FITCH,
of Committee.

**Complainants' Exhibit 7 on Trial of
Separate Defenses.**

595

New York, July 31, 1903.

TO THE MINORITY STOCKHOLDERS OF THE HOUSTON
AND TEXAS CENTRAL RAILWAY COMPANY.

Dear Sirs:

The suit brought by Cornelius MacArdell on behalf of himself and the other minority stockholders of the Houston and Texas Central Railway Company having been decided by Judge Truax of the New York Supreme Court, it is proper that we should now report to you the steps that have been taken since our last report and the steps we deem advisable to take hereafter.

596

As you may recall, the case was tried before Judge Truax in May, 1902, presenting principally questions of law which our counsel submitted for determination as to your rights in the vast land grants held by Frederic P. Olcott, as trustee. At the trial, it was conceded by Mr. Olcott's counsel that the lands were held in trust only and, among other questions submitted was one as to the extent, if any, of the interest of the stockholders of the Railway Company in those lands, and in the proceeds of such of the lands as had been sold by the trustee, amounting concededly to about \$4,000,000. Judge Truax after holding the case under advisement for over a year, decided as follows:

597

"I am of the opinion that the United States
"Circuit Court for the Eastern District of
"Texas had complete jurisdiction of the par-

598

"ties and of the subject matter in the consolidated cause wherein the decree of foreclosure and sale was rendered (which decree the plaintiff herein in effect seeks to have set aside) and that that decree cannot be reviewed by this court."

599

The case presents legal propositions which should be passed upon by the appellate courts, and as the case was tried with a view of preparing a record for final decision by the higher courts, it is now necessary to prepare for such appeal. We may say incidentally that the attorneys for the Railway Company applied to Judge Truax for an extra allowance in the sum of \$2,000 in view of the magnitude of the amount involved, which amount the court was authorized by law to grant, but after argument, in which the stockholders' position was presented to the court, Judge Truax granted an extra allowance of only \$500,—one-fourth of the amount the court would have been justified in awarding under ordinary circumstances.

600

The case can be appealed to the Appellate Division of the Supreme Court and, if decided against the stockholders, an appeal should be taken to the Court of Appeals. This can be done with comparatively little expense. The costs which have been awarded to all the counsel for the defendants—there being about twenty-two defendants—including the extra allowance of \$500, amounts only to \$1,195.03, and on appeal we will only require the bond of a surety company, which our counsel will arrange. The appeal, however, necessitates the record being printed, and that record is rather voluminous, including as it does,

in addition to the testimony of the witnesses examined at the trial in New York, the proceedings in the Texas foreclosure suit. Our counsel estimate the cost of printing this record for both the Appellate Division and the Court of Appeals, at about \$1,000. If we should be defeated in both courts, the entire costs will not, in the estimate of our counsel, exceed \$1,500, so that the carrying of this case to the highest court in the State will not exceed an expenditure of \$2,500, taking the most pessimistic view, that of defeat in the Court of Appeals as well as in the Appellate Division.

We are advised that this is pre-eminently a case that should be presented to the appellate court for determination, as the questions of law, which are involved are intricate and novel. Our adversaries have gone to great expense in contesting every step of this litigation and delaying the trial of the action as long as they possibly could.

If the case is not appealed, we will be obliged to pay the costs to date, which amount to about \$1,200.

When we consider the amount involved, and the large interests at stake, we have no hesitation in endorsing the advice of our counsel that this case should be carried to the higher courts.

Unless an appeal be promptly taken, the stockholders will lose their last opportunity for redress and the vast land grants in Texas consisting of some 3,000,000 acres, together with the proceeds of land sales made by the trustee, amounting to some \$4,000,000 will be effectively wrested from you, and will remain in the undisputed possession of those who conducted the so-called re-organization of the Houston and Texas Central Railway Company.

604

While your committee has on hand sufficient funds to meet the expenses and costs of the litigation to date, it will be necessary, in order to perfect and carry on the appeals above outlined, that an additional sum of \$2,500 be raised, and for the purpose of ascertaining your views, the committee has deemed it advisable to call a meeting of the minority stockholders at the office of Whittemore & Co. at 45 Broadway, in the City of New York, on the 3rd day of August, 1903, at 3 o'clock in the afternoon. The committee will be prepared at that meeting to suggest a proposition for raising this money without calling for further contributions from the stockholders.

605

As the matters to be discussed at this meeting are of the utmost importance, you are earnestly requested to be present either in person or by duly accredited representative.

Very truly yours,

R. B. WHITTEMORE,
HENRY FITCH,

606

of Committee.

**Complainants' Exhibit 8 on Trial of
Separate Defenses.** 607

STATE OF NEW YORK
OFFICE OF THE
SECRETARY OF STATE

Albany, May 8, 1913.

Messrs. Dittenhoefer, Gerber & James,
96 Broadway,
New York City.

Gentlemen:

608

Answering your communication of the 7th inst. we advise you no statement and designation has been filed by the Southern Pacific Company, a foreign corporation, nor has a certificate of authority to do business in this state been issued to said company.

Yours respectfully,

MITCHELL MAY,
Secretary of State, 609
By L.

610 **Opinion on Overruling of Defendant's
Motion for Judgment on Separate
Defenses.**

(Filed July 13, 1914.)

DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NEW YORK.

611	<hr/> HENRY BOGERT, et al., Complainants, against SOUTHERN PACIFIC COMPANY, Defendant. <hr/>	}
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CHATFIELD, J. :

612 Final hearing has been had upon certain pleas interposed in the answer of the defendant and which, if any one be sustained, will make unnecessary determination of the general issue on the claimed right to an accounting because of infliction of damage by the acts of the defendant, which are alleged to have been illegal and fraudulent.

The first plea has to do with the question of parties. It was previously held in the case of Lawrence vs. Southern Pacific Co., 180 Fed., 822, that necessary parties were absent, and appeal from the judgment of dismissal therein entered was dismissed in the Supreme Court of the United States, Bogert, as Executor of Lawrence vs. Southern Pacific Co., 228 U. S., 137.

In the present action the allegations of the complaint are the same as in the previous action, with the exception that the alleged wrongful acts are now set forth as the positive acts of the parties-defendant, while the plaintiff (and those whom he

Opinion on Overruling of Defendant's Motion for Judgment on Separate Defenses. 613

seeks to have join with him as parties-plaintiff) is basing his right to an accounting for acts causing damage upon allegations of injury to his own property by these alleged wrongful acts.

If the action is purely representative, and if the plaintiff can sue only as a stockholder, for the benefit of the corporation, then the present complaint is no different from the one upon which judgment of dismissal has been granted. The cases of

614

DeNeufville Co. vs. New York, &c., Ry.
Co., 81 Fed., 10;

Redfield vs. Baltimore & Ohio R. R. Co.,
124 Fed., 929;

Ames vs. American Tel. & Tel. Co., 166
Fed., 820;

Hunnewell vs. N. Y. Cent. &c., R. R. Co.,
196 Fed., 543;

Hyams vs. Old Dominion Co., 204 Fed.,
681;

Niles vs. New York Central R. R. Co.,
176 N. Y., 119;

Howe vs. N. Y., N. H. & H. R. R. Co.,
142 App. Div., 451;

Thompson vs. Stanley, 20 N. Y. Supp.,
317;

Loewenstein vs. Diamond Soda Water
Co., 94 App. Div., 383;

Michel vs. Betz, 108 App. Div., 241;

Knickerbocker vs. Conger, 110 App. Div.,
125;

McCrea vs. McClenahan, 114 App. Div.,
70;

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616 *Opinion on Overruling of Defendant's Motion for Judgment on Separate Defenses.*

- Brown vs. Utopia Land Co., 118 App. Div., 364;
 Miller vs. Crown Perfumery Co., 125 App. Div., 881;
 Davenport vs. Dows, 18 Wall., 626;
 Dewing vs. Perdicaries, 96 U. S., 193;
 Central R. R. Co. of New Jersey vs. Mills, 113 U. S., 249;
 Venner vs. Great Northern Ry., 209 U. S., 24;
 617 Swan Land & Cattle Co. vs. Frank, 148 U. S., 603;
 Eldred vs. American Palace Car Co., 105 Fed., 457;
 Morshhead vs. Southern Pac. Co., 123 Fed., 350;

and contra :

- Kuchler vs. Greene, 163 Fed., 91;
 Ervin vs. Oregon Ry. & Navigation Co., 20 Fed., 577;
 618 Crumlish vs. Shenandoah Valley R. R. Co., 28 W. Va., 623;
 Fletcher vs. Newark Telephone Co., 55 N. J. Eq., 47;
 Kidd vs. New Hampshire Traction Co., 72 N. H., 273;

have been cited and argued by both sides. None of them seem to be conclusive upon the present question. But the ordinary rules of equity would seem to make it possible for an individual to claim definite damage to his own property, whether that property be tangible assets or whether it be shares

*Opinion on Overruling of Defendant's Motion for
Judgment on Separate Defenses.* 619

of stock in a corporation whose property (if it should prove to have surplus or assets) would be divided among its stockholders.

If the plaintiff fails in proving damage, or if he fails in proving property rights to which he as a stockholder had a clear title (exclusive of his representative rights) then the absence of the party who had the legal title, that is, the Houston and Texas Central Railway Company, would make it impossible for a representative action to be maintained. 620

There is nothing in the pleadings or in the situation which renders it impossible upon the record of the plaintiff to show such a state of facts as would entitle him to recover, and this plea must therefore be overruled.

The present complaint has left unchanged some of the language which might have been so worded as to render the intent of the plaintiff more easily ascertained. But where a pleading has been dismissed upon a definite ground and the party amends or renews the pleading so as to obviate the difficulty, and where the new pleading is capable of construction so as to avoid the difficulty, as well as to be no different from the previous pleading, the construction which would respect the previous decision, and conform thereto, must be held to be the intended meaning. 621

Another plea in bar is based upon the legal defense of the Statute of Limitations, and is urged in the form of an estoppel because of laches through a period exceeding that of the term defined as a defense at law. This plea comes up in several forms. In the first place, the present plaintiff and his predecessor in title has throughout all

622 *Opinion on Overruling of Defendant's Motion for Judgment on Separate Defenses.*

623 these years been interested in litigation which, starting with the year 1891, has continued to the present time. He has never been nominally or actually a party in court, but where the proceedings have been in equity he had the right to join and has not done so. He knew of the proceedings and helped financially and by advice in their progress. The defendant urges that he has elected not to begin any action on his own part until the other attempts by different parties have in turn failed; and, therefore, elected between two inconsistent remedies.

Harrill vs. Davis, 168 Fed., 187.

Mills vs. Parkhurst, 126 N. Y., 89.

In re Garver, 176 N. Y., 386.

Henry vs. Harrington, 193 N. Y., 218.

Baird vs. Erie R. R. Co., 210 N. Y., 225.

624 It is not necessary to consider whether, if the testator had attempted to bring some of the previous actions and had thus elected to present his claim for remedy in that form, he would now be held to have waived his rights and to be estopped from urging the same alleged rights in this present form of action.

Klipstein & Co. vs. Grant, 141 Fed., 72.

In re Jacob Berry, 174 Fed., 409.

Bobbs-Merrill Co. vs. Strauss, 147 Fed., 15.

Iverson vs. Minnesota Mutual Life Ins. Co., 137 Fed., 268.

Bracken vs. Atlantic Trust Co., 167 N. Y., 510.

*Opinion on Overruling of Defendant's Motion for
Judgment on Separate Defenses.* 625

It is urged by the defendant that its records have been lost, witnesses have disappeared, that the lapse of time has rendered it impossible to fairly try the case, and that this has occurred with the knowledge of the plaintiff's predecessor (testator) throughout such a period that he should not now be allowed to take advantage of his previous neglect. The various records of the case, however, indicate that no serious difficulties are presented upon this score, and that, strange as it may seem, the case can now be tried with a record of the necessary testimony, in substantially as complete a way as if undertaken many years ago. 626

The various suits which have been instituted and the decisions rendered thereon need not be discussed, but should be enumerated as follows:

- Carey vs. H. & T. C. Ry. Co., 45 Fed., 438 (1891); 52 Fed., 671 (1892), C. C. E. D., Tex.; stockholders held not entitled to decree enjoining carrying out of plan of reorganization or to have foreclosure set aside as fraudulent. 627
- Carey vs. H. & T. C. Ry. Co., 150 U. S., 170 (1883); appeal to Supreme Court from decree of Circuit Court dismissed.
- Carey vs. H. & T. C. Ry. Co., 9 C. C. A., 687; 13 U. S. App., 729 (1894); decree of Circuit Court affirmed by Circuit Court of Appeals for the Fifth Circuit.
- Carey vs. H. & T. C. Ry. Co., 161 U. S., 115 (1896); appeal to Supreme Court from decree of Circuit Court of Appeals dismissed.

628 *Opinion on Overruling of Defendant's Motion for Judgment on Separate Defenses.*

Gernsheim vs. Olcott, 7 N. Y. Supp., 872 (1889); 10 N. Y. Supp., 438 (1890); Gernsheim vs. Central Trust Co., 16 N. Y. Supp., 127; 61 Hun, 625 (1891); stockholders held not entitled to reduction of assessment or to injunction against distribution of stock of new company under reorganization.

629 McArdell vs. Olcott, 104 App. Div., 263 (1905); 189 N. Y., 368 (1907); action by stockholders to set aside foreclosure sale and annul reorganization agreement on ground of fraud dismissed.

MacArdell vs. Olcott, 62 App. Div., 127 (1901); application of stockholder for leave to intervene denied for laches.

Lawrence vs. Southern Pacific Co., 165 Fed., 241 (1908); 177 Fed., 547 (1910); 180 Fed., 822 (1910), C. C., E. D., N. Y.; action by stockholder for accounting and other relief; motions to remand denied and suit dismissed.

630 Bogert vs. Southern Pacific Co., 228 U. S., 137 (1913); appeal to Supreme Court from decree of Circuit Court in Lawrence vs. Southern Pacific Co. (supra) dismissed.

MacArdell vs. Olcott, N. Y. Court of Appeals, October 29, 1907, 189 N. Y., 369, affirming 104 App. Div. (supra), with statement of limitations in the complaint.

In the last named case the Court (two Judges dissenting) did not attempt to consider the merits

*Opinion on Overruling of Defendant's Motion for
Judgment on Separate Defenses.* 631

of this transaction, but expressly stated that the present form of action was not presented by that complaint.

The matter has always been disposed of upon questions of pleading, or with respect to the validity of the foreclosure action. The plaintiff seems to have at last brought the matter up in such a way that the issue can be heard. If any of the pleas in bar should be sufficient, the rights of the defendant to renew those pleas, at the close of the testimony in the entire case, will be preserved to him; but upon the present record and upon the preliminary hearing, the pleas in bar will be overruled and the case put upon the calendar for hearing upon the entire issue as well as the pleas involved herein. 632

634 Order Overruling Defendant's Motion for Judgment on Separate Defenses.

(Filed July 18, 1914.)

At a Stated Term of the United States District Court for the Eastern District of New York, held at the Court House thereof in the Post Office Building in the Borough of Brooklyn, County of Kings, State of New York, on the 18th day of July, 1914.

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Present—HONORABLE THOMAS I. CHATFIELD,
Judge.

HENRY BOGERT, et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

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The Court having granted the motion of the defendant for a trial of the issues raised by the separate defenses pleaded in its answer, other than the Seventh Separate Defense, prior to the trial of the principal case, and said issues having been duly called for trial and the parties have duly submitted their evidence, and defendant having moved for judgment upon said separate defenses, and the matter having been argued by counsel and duly submitted, and due deliberation having been had, upon consideration thereof, it is

Order Overruling Defendant's Motion for Judgment on Separate Defenses. 637

ORDERED, ADJUDGED AND DECREED that the motion of the defendant for judgment upon the separate defenses contained in its answer, other than the Seventh Separate Defense, be and the same hereby are overruled, with leave to the defendant at the close of the testimony in the entire case to renew said motion for judgment thereon; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the case be put upon the calendar for hearing upon the entire issue as well as upon the separate defenses involved herein. 638

THOMAS I. CHATFIELD,
U. S. D. J.

640 **Stipulation for the Examination of
Thomas Chaffee De Bene Esse.**

(Filed, September 15, 1914.)

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

641 SOUTHERN PACIFIC COMPANY,
Defendant.

642 IT IS HEREBY STIPULATED AND AGREED
that the testimony of Thomas Chaffee, a witness
on behalf of the complainants, be taken de bene
esse before Robert G. Schmidt, notary public, at
room 138, No. 96 Broadway, in the Borough of
Manhattan, City of New York, on the 17th day of
September, 1914, at 3 o'clock in the afternoon, or
at such other time or times to which the examina-
tion may be adjourned, and that the said testimony
may be read on the trial or trials of this action
with the same force and effect as though the said
witness had been sworn and given his testimony in
open Court at the trial or trials of the action, and
that the defendant be at liberty to cross examine
the witness, and that an order may be entered to
carry this stipulation into effect without further
notice.

Dated, New York, September 15, 1914.

DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainants.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant.

Order for the Examination of Thomas Chaffee De Bene Esse. 643

(Filed, September 15, 1914.)

At a Stated Term of the United States District Court, held in and for the Eastern District of New York, at the United States Court House and Post Office Building, in the Borough of Brooklyn, County of Kings, State of New York, on the 15th day of September, 1914.

Present—Hon. THOMAS I. CHATFIELD, Dis. Judge. 644

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

On reading and filing the annexed stipulation, and on motion of Dittenhoefer, Gerber & James, attorneys for complainants, it is

ORDERED that the testimony of Thomas Chaffee, a witness on behalf of the complainants, be taken de bene esse before Robert G. Schmidt, notary public, at room 138, No. 96 Broadway, in the Borough of Manhattan, City of New York, on the 17th day of September, 1914, at 3 o'clock in the afternoon, or at such other time or times to which the examination may be adjourned, and that the said testimony may be read on the trial or trials of this action with the same force and effect as though the said witness had been sworn and given his testimony in open Court at the trial or trials of this action, and that the defendant be at liberty to cross examine the witness. 645

THOMAS I. CHATFIELD,
J. D. C.

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Trial of Main Issue.

DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF NEW YORK.

647

HENRY L. BOGERT, et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

Brooklyn, November 16th, 1914.

Before—Hon. THOMAS I. CHATFIELD, Judge.

APPEARANCES:

MESSRS. DITTENHOEFER, GERBER & JAMES, by
David Gerber, Esq., and Dudley F. Phelps,
Esq., for Complainants.

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MESSRS. JOLINE, LARKIN & RATHBONE, by Arthur
H. VanBrunt, Esq., and Lewis H. Freedman,
Esq., for Defendant.

IT IS STIPULATED by and between the parties hereto as to the following facts, subject, however, to objection upon the trial of the action that such facts are immaterial and irrelevant.

FIRST.—That all the testimony, exhibits and evidence in the trial or hearing of the separate defenses, other than the seventh separate defense,

heretofore had before the Honorable Thomas I. Chatfield, United States District Judge, beginning on or about March 25th, 1914, shall be considered in evidence upon the main trial of this suit, and all other subsequent hearings or proceedings herein.

SECOND.—That all stipulations and admissions of counsel made upon the said trial or hearing commencing on or about March 25th, 1914, before the Honorable Thomas I. Chatfield, and all other stipulations contained in the various records in evidence, or now stipulated in evidence, shall have the same force and effect as though fully set forth herein and again agreed to.

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THIRD.—That in the event of judgment in favor of the complainants, the minority stockholders committee now composed of R. B. Whittemore, Henry Fitch and Russell H. Landale, or their successors, as such committee, and all owners or holders of stock of the Houston and Texas Central Railway Company, who are subscribers to the minority stockholders agreements of November 20th, 1889, and September, 1890, and have deposited their stock with said committee, or their heirs, executors, administrators, successors or assigns who may wish to do so, shall be made parties plaintiffs herein, and said judgment shall provide for and protect their interests as stockholders of said Houston and Texas Central Railway Company with the same force and effect as though they were now joined as parties plaintiffs to this suit.

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(NOTE.—Pursuant to the foregoing stipulations, the complainants offered and read in evidence all of the direct evidence and exhibits introduced by them, all of the stipulations made by them, and

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all of the objections raised by them; and the defendant also offered and read in evidence all of the evidence and exhibits adduced or introduced by it on cross examination, all of the stipulations made by it, and all of the objections raised by it on the trial of or hearing upon the separate defenses herein heretofore had on or about the 25th day of March, 1914, before the Honorable Thomas I. Chatfield, United States District Judge, and all of which evidence, stipulations and objections are omitted at this point of this record for the reason that all of the same are printed at pages 142 to 203 hereof, the same being the record herein of the said trial of or hearing upon the said separate defenses.)

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Mr. Gerber: I read in evidence the deposition of Thomas Chaffee, a witness called on behalf of the complainants, taken de bene essee, pursuant to an order of September 15, 1914, before Robert G. Schmidt, Notary Public, at Room 138, No. 96 Broadway, Borough of Manhattan, City of New York, on the 17th day of September, 1914, at 3 o'clock in the afternoon, said deposition having been taken subject to objection and exceptions to be taken at the trial.

Mr. Freedman: I object to the reading of this testimony given by the witness as incompetent, irrelevant and immaterial, not within the issues raised by the pleadings.

Decision reserved.

Direct Examination by Mr. Gerber:

My full name is Thomas Chaffee. If I live to the 31st day of December, this year, I will be 76

years old. I live at Miami, Florida; but I have a home at 39 Putnam Avenue, Brooklyn, and another at Melbourne, Florida. I spend nine months of the year at Miami. My wife lives with me down there. I intend to leave for Miami with my wife next Wednesday morning. We should have left Saturday, but she had a cold. My wife is an invalid and has lived down in that climate for the last twenty years. I knew Walter B. Lawrence in his lifetime. I had known him, well, perhaps as far back as 1885. I would not want to be definite; maybe two or three years earlier; somewhere about 1885. His business was stock broker. I suppose he was a member of the New York Stock Exchange. He was a member of Lawrence & Wood, and Lawrence, I understood, was always a member for years. I cannot just say when he became a member of the Exchange. He purchased for me some stock of the Houston & Texas Central Railway Company. He purchased 100 shares on the 11th day of January, 1887. I fix that date with that accuracy because I keep an account of all business transactions, where I buy and sell anything. I have a diary every year, and I keep in the back part of my every year diary an account with everyone I have business dealings with, and I find I had an account with Lawrence & Wood in that year, and I found this entry January 11, 1887, 100 shares of Houston & Texas stock, bought at, I can give you the exact amount, at 42¾. I have brought with me the diary of 1887, to which I refer (witness hands book to Mr. Gerber). This book which I just handed you is the one I referred to. It bears the date of 1887 and is the one.

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Mr. Gerber: I ask that the diary be marked for identification.

Marked for identification, Plff's Ex. 1,
Sept. 17/14.

I hand you the book which has been marked Ex. 1, September 17, 1914, for identification, and show you the page that refers to the entry that I have spoken about. I call your attention to an entry which is found on a page headed "cash account, May," and under date of January 11, 1887, you will see the words "Buy 1 c. Hou. & Tex. 42 $\frac{3}{4}$, \$4,287.50." That entry was made on the day it purports to bear date.

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Mr. Gerber: I offer in evidence the page taken from the diary, "Plff's Ex. 1, Sept. 17/14, for id," which contains the entry of the purchase of the 100 shares of Houston & Texas Central Railway Company stock.

IT IS STIPULATED that instead of the original, a copy of the said page may be spread in full upon the minutes, with the same force and effect as if the original were produced; the page being as follows:

		"Cash Account. May.		
		Date.....	Received.	Paid.
		Lawrence & Wood		
			Cr.	
		1887		
Jan.	5	By 1 c. Un. Pac.	60 $\frac{1}{2}$	\$6,062.50
"	6	" 1 c. " "	59 $\frac{5}{8}$	5,975.
"	10	" 1 c. Susq. pfd.	32 $\frac{1}{8}$	3,225.
"	11	" 1 c. Hou. & Tex.	42 $\frac{3}{4}$	4,287.50
"	11	" 1 c. Chic. St. L.		
		& P.		
"	1	" bal. from old ac.	17 $\frac{3}{4}$	1,787.50
"	31	" interest		6,690.99
"	31	" bal. to new ac.		5.87
				<hr/>
				\$28,034.36

It has been my practice to keep a diary each year and enter matters as they occur. The year of 1887 was not an exceptional year for the keeping of a diary. The entry "1 c." means 100; Roman notation "c" stands for 100, you know. "Hou. & Tex." is an abbreviation for "Houston & Texas." That refers to the Houston & Texas Central Railway stock. The space was limited, so I had to abbreviate. I carried an account, a stock account, with this firm of Lawrence & Wood. I keep an account with Lawrence & Wood. This stock was carried on margin. The custom with brokers in New York at that time, as to delivery of stock to their customers, where stock was only purchased on margin was to notify that they had bought this stock, but they don't deliver it to you; they keep it and charge your account—charge it up to you on your account. That is, they hold it as security until the balance is paid. As to how I came to buy this stock, Mr. Lawrence advised me to buy it very strongly. At that time he held stock. He held 100 shares. As to how long before me he acquired his stock I cannot say. He may have told me. He thought very favorably of the stock, and that induced me to buy it. I cannot say when Lawrence bought his stock. I cannot tell how long prior to 1887. The impression he gave me was that he had purchased the stock some time before. At any rate, it was before I bought mine; that is the reason I bought it. I knew that there was a Protective Committee of stockholders of the stock of the Houston & Texas Central Railway Company, representing the minority stockholders. Mr. Lawrence took care of my interest, so far as the minority stockholders were concerned. I was in sympathy with the action of the Protective Com-

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mittee. I paid at least—well, at least two assessments. Mr. Lawrence paid the others for me. Those that I paid, I think were the first two, and subsequently Mr. Lawrence paid them for me. I was advised of what was being done by the Protective Committee to protect the stock. Whenever I would come up here and meet him I would always talk over matters with him, and was kept advised. I saw Mr. Lawrence practically every year—once or twice, when I came North. At that time I discussed the situation, respecting the Houston & Texas Central Railway litigations. I talked with him, hoping to get a little favorable information. I certainly did approve of all the steps taken, by or through Mr. Lawrence, protecting his own stock and my 100 shares. The firm of Dick Brothers & Lawrence was formed May 1st, or about May 1st, 1888. Dick Brothers & Lawrence, I am talking about now; that's right, about that date. The 100 shares of stock that I owned was transferred to Dick Brothers & Lawrence I think—well, about August 12, 1890. On looking at the certificates, and looking at the date of the transfer, I refresh my recollection. The transfer was on August 11, 1890. These are the two certificates, each for 50, to which I refer as having been transferred August 11, 1890, to Dick Brothers & Lawrence.

Mr. Gerber: I offer these in evidence.

The certificates received in evidence and marked respectively Exhibits 9 and 10.

As to one of the Protective Committee's agreements with the stockholders, introduced in evidence on behalf of the complainants at a preceding hearing, showing that in September, 1890, Dick Brothers & Lawrence signed the agreement

representing 200 shares of stock, I should say that this transfer on August 11, 1890, to Dick Brothers & Lawrence was made in view of that intended agreement among the stockholders with the Protective Committee; my hundred shares were part of the 200; my original certificates that I acquired in 1887 remained with Lawrence & Wood, and they were turned over to Dick Brothers & Lawrence about May 1, 1888, when the firm of Lawrence & Wood went out; that is when Lawrence & Wood went out and were succeeded by Dick Brothers & Lawrence. That transfer was made with my consent. They continued to hold the certificates for me against a margin account. I gave instructions to surrender my certificate for 100 shares to the Protective Committee, I refer now to the Protective Committee representing the minority stockholders, about August, 1890; that is about the time of this transfer and the time new certificates were issued, which certificates have been produced. I presume that those certificates have been, at a matter of fact, in the hands of the Protective Committee ever since. They were not produced by me to-day, except through the attorneys for the plaintiffs. I closed my account with Dick Brothers & Lawrence, well, some years later; I could not tell you now, but I closed it years ago; probably in 1895 or somewhere around there. This is not the only stock I bought through Dick Brothers & Lawrence, or Lawrence & Wood; I had a regular stock account there. These particular shares of stock of the Houston & Texas Central Railway Company have been paid for in full. Everything has been paid for; I don't owe them anything, and didn't when I closed up the account. They were paid up entirely.

Deposition of Thomas Chaffee—Cross.

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Mr. Freedman: Without waiving the grounds of the objection, I read in evidence the cross-examination of the witness Thomas Chaffee.

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I testified that I paid two installments of an assessment on this stock; well, I think one assessment was \$50 and the other \$25, and my recollection is one assessment was paid in 1890 and the other about 1895. As to whether I ever received any request for payment of any further assessments, well, I think they were to have the stock. I think the other assessment was for stock, but that is all I have an account of. As to whether it is a fact that the assessments that I paid were only the first two of the assessments called for by the committee, I am not certain whether there were more than two assessments or not; there were two, I know. No, I don't think I ever had any correspondence with Lawrence & Wood or with Dick Brothers & Lawrence in regard to any action to be taken under this Protective agreement. I lived here in those early years of litigation, and it was

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by word of mouth with Mr. Lawrence. I always used to talk with him. He was the only one who knew about it. After I went down South, once a year I would come to New York and talk with him. I never had any conversation with anyone, other than Mr. Lawrence, in regard to steps to be taken under the Protective agreement. I never had any communication with the reorganization committee of the Houston & Texas Central Railway Company. I depended upon Mr. Lawrence to act for me and do whatever was necessary in the case. In fact, I wasn't acquainted with any other people, excepting Mr. Lawrence, in the matter. Whatever

conversations I had in regard to a reorganization were solely with Mr. Lawrence. I did not know any other Houston & Texas stock owner, I don't think, but him. My instructions in regard to the delivery of my stock to the Protective Committee were given to Mr. Lawrence. As to whether I instructed Mr. Lawrence to sign the Protective agreement, well, I instructed him to do everything that was necessary to bring me in to share in the litigation; none of the other members of the firm of Dick Brothers & Lawrence was familiar with it, except Mr. Lawrence. I was aware of the fact that this litigation was pending. It was pending a good many years from the time it started.

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Mr. Gerber: I read in evidence the re-direct examination of the witness Thomas Chaffee:

I refer to Walter B. Lawrence. He is dead now. I left it to him to look out for my interests, respecting assessments and everything else, in connection with this Protective Committee. He was to have charge of it. I had an arrangement with Mr. Lawrence to take care of any later assessments after 1895 for me. He was to act, if there was any action. He had general instructions in that way. His instructions were general to protect my interest in the 100 shares which I owned.

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Mr. Freedman: Without waiving objection, I read in evidence the re-cross examination of the witness Thomas Chaffee:

I don't know whether Mr. Lawrence ever did take any action in regard to the payment of any later assessment. I cannot say that I do know,

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Deposition of Thomas Chaffee—Re-direct.

but I assume that he turned over whatever was charged to me, you know, for assessments, to the committee. After I left the city to go south, I rather lost track of things generally. I did not undertake anything—buy or sell. I wasn't where I could get all particulars, except that I dropped in to see Mr. Lawrence the following summer and had a talk with him.

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Mr. Gerber: I read in evidence re-direct examination of the witness Thomas Chaffee:

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At the time that I bought this stock through Mr. Lawrence, that I refer to, I understood that the land grants of the Houston & Texas Central Railway Company were enough to pay the bonds of the company that were then outstanding. Well, I got my information from Mr. Lawrence. The land grant was what we considered our safety in the thing that was going to make the speculation a good one. No, I could not say that I understood from Mr. Lawrence also, in my talks with him at the time that I bought this stock, that there could be no foreclosure of the mortgages until there was a default in the payment of principal—for non-payment of the principal. We discussed the matter in its different stages, but I have no recollection of it.

Mr. Gerber: IT IS HEREBY STIPULATED by and between the counsel for the respective parties that William A. Fallon, Jr., will testify to the following facts, as a witness for the complainants:

That he is the office manager of Dick Brothers, and has been with them for at least twelve years last past, and is familiar

Stipulation as to the Testimony of William A. Fallon. 679

with their method of doing business, keeping their books and making entries therein.

That Walter B. Lawrence, complainants' intestate, was a member of the stock exchange firm of Lawrence & Wood, for some years prior to May, 1888.

That on May 1, 1888, the firm of Lawrence & Wood having been dissolved, Lawrence joined Dick Brothers, which firm became known as Dick Brothers & Lawrence; remained so until Lawrence retired from that firm, just prior to his death some years ago, and the firm is now known as Dick Brothers. 680

That the two certificates of Houston & Texas Central Railway Company, for fifty shares each, numbered 10583 and 10584, respectively, in the name of Dick Brothers & Lawrence, and endorsed in blank Dick Brothers & Lawrence, were the property of Mr. Lawrence, and were acquired by him some time prior to May 1, 1888, and delivered by him to the firm of Dick Brothers & Lawrence, which latter firm, at the direction of Mr. Lawrence, delivered the certificates to the Protective Committee of the minority stockholders of the Houston & Texas Central Railway Company, of which Mr. Henry E. Fitch is a member, on August 11, 1890. 681

IT IS FURTHER STIPULATED, that this stipulation may be read in evidence by the complainants, as part of their case, with the same force and effect as if said witness was in Court and testified to said facts.

IT IS STIPULATED by and between the parties hereto that the Houston & Texas

Stipulations and Documentary Evidence.

682

Central Railroad Company has no preferred stock authorized, issued or outstanding. It has authorized, issued and outstanding one hundred thousand (100,000) shares of common stock of the par value of One hundred dollars (\$100) each, of which the Southern Pacific owns Ninety-nine thousand nine hundred eighty-four (99,984) shares, subject as to ninety-nine thousand nine hundred eighty-three (99,983) shares to the pledge thereof to the United States Trust Company, as Trustee for Central Pacific Railway four per cent. (4%) European loan of 1911. The remaining shares of the common stock of the Houston & Texas Central Railway Company are in the names of various individuals, many of whom are directors of said Company.

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IT IS FURTHER STIPULATED, that the stipulation may be read in evidence upon the trial of this action, with the same force and effect as if the facts therein set forth were testified to.

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The defendant concedes that the facts set forth in the twenty-ninth annual report of the Southern Pacific Company and proprietary companies for the year ending June 30th, 1913, are true, and that it will not object upon the trial of this action, to the introduction of the said report or parts thereof, in evidence, upon the ground that the said report is not the proper or best evidence of said facts, but will only object to the introduction of said report or parts thereof upon the ground that said facts are immaterial and irrelevant.

Mr. Gerber: I offer in evidence so much of the Twenty-ninth Annual Report of the Southern Pacific Company and Proprietary Companies for the fiscal year ending June 30th, 1913, as refers to the Houston & Texas Railway Company as found on pages 5, 30, 50, 53, 55, 61, 66, 71, and 81.

Mr. Freedman: I object to that on the ground that the facts offered are immaterial and irrelevant.

Decision reserved.

Received and marked Exhibit 11.

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Mr. Gerber: I read in evidence the following:

IT IS STIPULATED by and between the counsel for the parties hereto that the ownership of a majority of the stock of the Morgan Company by the Southern Pacific Company and the ownership of a majority of the stock of the Houston and Texas Central Railway Company by the Morgan Company as set forth in paragraph 47 of defendant's answer herein continued down to the time of the foreclosure and sale in 1888.

687

Mr. Gerber: I offer in evidence the appointment of Russell H. Landale as a member of the Protective Committee of the Minority stockholders of the Houston & Texas Railway Company, in the place of Andrew S. McClelland, deceased, acknowledged by Mr. Whitteman, October 2nd, 1914, by Henry Fitch, November 4th, 1914.

Mr. Freedman: I object to that as immaterial and irrelevant, not proving any facts within the issues raised by the pleadings.

Decision reserved.

Defendant's Motion to Dismiss.

Paper received in evidence and marked Exhibit 12.

Mr. Gerber: I offer in evidence the acceptance of Russell H. Landale of the appointment as a member of the said Committee acknowledged November 12th, 1914.

Mr. Freedman: Same objection.

Decision reserved.

Paper received in evidence and marked Exhibit 13.

Mr. Gerber: In view of the stipulation read in evidence and as all the exhibits introduced in evidence upon the prior trial or hearing of or about March 25th, 1914, and referred to in the stipulation, are considered in evidence on this trial or hearing—

Complainants rest.

Mr. Van Brunt: The defendants move to dismiss the complaint on the ground that plaintiff has failed to prove a cause of action alleged in the complaint, and has failed to prove any cause of action whatsoever to entitle him to any relief.

Decision reserved.

(NOTE—Pursuant to the stipulations, printed on pages 216 and 217 of this record, the defendant offered and read in evidence all of the direct evidence and exhibits introduced by it, all of the stipulations made by it and all of the objections raised by it, and the complainants also offered and read in evidence all of the evidence and exhibits adduced or introduced by them on cross-examination, all of the stipulations made by

them, and all of the objections raised by them on the trial of or hearing upon the separate defenses herein, heretofore had on or about the 25th day of March, 1914, before the Honorable Thomas I. Chatfield, United States District Judge, and all of which evidence, stipulations and objections are omitted at this point of this record for the reason that all of the same are printed at pages 142 to 203 hereof, the same being the record herein of the said trial of or hearing upon the said separate defenses.)

692

IT IS STIPULATED by and between counsel for the parties to this action as follows:

1. That at the date of the entry of the decree of foreclosure and sale in the action of Easton and Rintoul against Houston & Texas Central Railway Company and others (known as Consolidated cause No. 198), May 4, 1888, the following mortgages of said Railway Company were outstanding:

- (1) Main Line first mortgage dated July 1, 1886. 693
- (2) Western Division first mortgage dated December 21, 1870.
- (3) Wasco & Northwestern Division first mortgage dated July 16, 1873.
- (4) Main Line & Western Division Consolidated mortgage dated October 1, 1872.
- (5) Wasco & Northwestern Division Consolidated mortgage dated May 1, 1875.
- (6) Income and Indemnity mortgage dated May 7, 1877.
- (7) General mortgage dated April 1, 1881.

694

2. The decree of May 4, 1888, provide for the foreclosure of all of the above mentioned mortgages except the Wasco & Northwestern first mortgage and the sale of the property covered thereby.

695

3. That the said mortgages, so foreclosed, covered all the property, both real and personal, of every nature and description, including land grants belonging to the Houston & Texas Central Railway Company.

696

4. That petitions of intervention were filed in Consolidated Cause No. 198 by the Lackawanna Iron and Coal Company, Morgan's Louisiana & Texas Railroad & Steamship Company and the Southern Development Company. That in such petitions claim was made of priority for the indebtedness therein set up over the interest due and unpaid on the various outstanding mortgages of the Houston & Texas Central Railway Company. That answers were interposed to such petitions by certain of the mortgage trustees and by the Railway Company, challenging the amount of the indebtedness claimed by said petitioners and the priority thereof over the interest due on the various outstanding mortgages. The issue raised by such pleadings were referred to a Special Master, who duly filed reports in which he found said claims to be valid and existing claims against the Railway Company for the amounts set forth in his report; and as to the claims of the Lackawanna Company and the Development Com-

pany, he also sustained their claims to priority over the outstanding mortgages.

5. Suits were begun by the Lackawanna Iron & Coal Company, Morgan's Louisiana & Texas Railroad & Steamship Company and the Southern Development Company upon their claims in the District Court of the County of Dallas against the Houston & Texas Central Railway Company, in which the following judgments were entered against the Houston & Texas Railway Company on May 17, 1889:

698

Lackawanna Iron & Coal Company, \$555,914.25 with interest at the rate of 8%.

Morgan's Louisiana & Texas Railroad & Steamship Company \$1,795,570.81, with interest at the rate of 8%.

Southern Development Company \$858,133.15, interest at 8%.

Executions were issued on each of said judgments on August 19, 1889, which were returned nulla bona and the said judgments each remain of record unsatisfied, and have not been paid.

699

6. No floating debt creditor took advantage of the provisions of the re-organization plan, and no stockholder floating debt creditor paid the assessments which they were required to pay in order to obtain their pro rata shares of the stock of the Houston & Texas Central Railway Company.

7. The Southern Pacific Company provided and paid to the Central Trust Company of New York, under the provisions of

700

the Reorganization Agreement, the entire amount of the cash payments to be made thereunder for interest and bonus to the holders of first mortgage bonds and coupons and for the necessary charges, liabilities and expenses incurred by said Central Trust Company in carrying out the provisions of said agreement, and that the amount so paid out was between \$2,500,000 and \$3,000,000.

701

Mr. Freedman: I offer in evidence certified copy of the certificate of the Clerk of the District Court of Dallas County, Texas, dated October 22nd, 1914, in respect to judgment entered on May 17, 1889, for the sum of \$555,914.25, in favor of the Lackawanna Iron & Coal Company and against the Houston & Texas Central Railway Company.

Mr. Gerber: That is objected to as incompetent, irrelevant and immaterial and not within the issues.

Decision reserved.

702

Received and marked Exhibit G.

Mr. Freedman: I offer in evidence the certificate of the Clerk of the District Court, Dallas County, Texas, dated October 22nd, 1914, as to the entry of the judgment of May 17th, 1889, for the sum of \$858,113.15, in favor of the Southern Development Company and against the Houston & Texas Railway Company.

Mr. Gerber: I object to that as incompetent, irrelevant and immaterial, and not within the issues.

Received and marked Exhibit "H."

Mr. Freedman: I offer in evidence certificate of the Clerk of the District Court of Dallas County, Texas, dated October 22nd, 1914, in respect to the entry of the judgment May 17th, 1889, for the sum of \$1,795,-570.81, in favor of the Morgan's Louisiana & Texas Railroad & Steamship Company against the Houston & Texas Central Railway Company.

Mr. Gerber: I object to that as incompetent irrelevant and immaterial.

Received and marked Exhibit "I." 704

Defendant rests.

Testimony closed.

Complainants' Exhibits 1, 2, 3, 4, 5, 6, 7, and 8 on Trial of Main Issue.

(NOTE—These exhibits are the same as Complainants' exhibits of the same respective numbers introduced on the hearing on the separate defenses herein, and are not here printed for the reason that they are printed in connection with the said hearing at pages 183 to 203 of this record.) 705

706 **Complainants' Exhibit 9 on Trial of
Main Issue.**

Number 10828

Shares 50

"THIS CERTIFICATE ENTITLES

Dick Bros. & Lawrence
To Fifty Shares of

One Hundred Dollars each in the Capital stock
of the

707 HOUSTON & TEXAS CENTRAL RAILWAY COMPANY,
Incorporated under the laws of the State of Texas,
Transferable only on the Books of the Company
in accordance with the By Laws in person or by
Attorney on surrender of this Certificate.

IN WITNESS WHEREOF, the said Company
has caused this Certificate to be signed by their
President and Secretary, and countersigned by
the Register and Transfer Agents at New York,
this 8th day of Aug. 1890.

708 Countersigned this 11 day
of Aug. 1890.

THE FARMERS' LOAN &
TRUST CO. OF N. Y.
Registrar

R. G. R. SANDFORD
Registrar

J. WALDO
Vice President

H. HALL
Secretary

SHARES \$100 EACH

(Endorsement on back of certificate)

FOR VALUE RECEIVED
 the undersigned hereby sell and transfer to
 Shares
 of stock within mentioned and described and
 hereby appoint
 true and lawful attorney irrevocable (with power
 of substitution) to transfer said stock on the
 books of the Company.

Witness hand and seal this
 11th day of Aug. 1890.

DICK BROS. & LAWRENCE

Witness

J. E. R. BONDIEAU"

**Complainants' Exhibit 10 on Trial of
 Main Issue.**

Number 1082⁹

50 shares

"THIS CERTIFICATE ENTITLES

Dick Bros. & Lawrence

To Fifty Shares of

One Hundred Dollars each in the Capital stock

of the

HOUSTON & TEXAS CENTRAL RAILWAY COMPANY,
Incorporated under the laws of the State of Texas,
 Transferable only on the Books of the Company

Countersigned this 8 day of Aug. 1890
 GEO. WATKINS,
 Transfer Agent

710

711

Complainants' Exhibit. 10

712

in accordance with the By Laws in person or by attorney on surrender of this Certificate.

IN WITNESS WHEREOF, the said Company has caused this Certificate to be signed by their President and Secretary, and countersigned by the Register and Transfer Agents at New York, this 8 day of Aug. 1890.

Countersigned this 11 day
of Aug. 1890.

713

THE FARMERS' LOAN &
TRUST CO. OF N. Y.

Registrar

R. G. R. SANDFORD

Registrar

J. WALDO

Vice President

H. HALL

Secretary

SHARES \$100 EACH

(Endorsement on back of certificate)

FOR VALUE RECEIVED
the undersigned hereby sell and transfer to Shares
of stock within mentioned and described and
hereby appoint
true and lawful attorney irrevocable (with power
of substitution) to transfer said stock on the
books of the Company.

Witness hand and seal this
11th day of Aug. 1890.

DICK BROS. & LAWRENCE

Witness

J. E. R. BONDIEAU"

714

Countersigned this 8 day of Aug. 1890
GEO. WATKINS, Transfer Agent

Complainants' Exhibit 11 on Trial of 715 Main Issue.

(NOTE—Although the report of which this exhibit is a part refers to several companies, only its references to the Houston & Texas Central R. R. Co. are printed in this exhibit in accordance with the offer in evidence, but under the order printed at pages 277 and 278 of this record the whole report is to be handed up on the argument of this cause.)

SOUTHERN PACIFIC COMPANY 716

Report of the Board of Directors.

New York, December 19, 1913.

TO THE STOCKHOLDERS OF THE SOUTHERN PACIFIC
COMPANY:

The Board of Directors submit herewith their report of operations of the Southern Pacific Company and of the Proprietary Companies for the fiscal year ended June 30, 1913.

717

PROPERTIES AND MILEAGE.

The transportation lines constituting the Southern Pacific System, June 30, 1913, were as follows:

DIVISION—A.—Mileage of lines belonging to or leased by Companies, the capital stocks of which are principally owned by the Southern Pacific Company: (2) Operated by the Companies owning them: Houston & Texas Central R. R.—First Main Track, 789.01 miles; Additional Main Track, 1.27 miles; Sidings, 242.16 miles.

718

Complainants' Exhibit. //

 No. 1—PROPRIETARY COMPANIES—MILEAGE OF
RAILWAYS—JUNE 30, 1913.

A. (2) Lines operated by the companies owning them.

	Name of Company	First	Add'l	Sid-
		Main	Main	
		Track	Track	ings
	HOUSTON & TEXAS CENTRAL			
719	RAILROAD (Texas):			
	Houston to Denison.....	337.98		
	Grand Central Depot, Houston, to Chaney Junction		1.27	
	Hempstead to Austin....	115.00		
	Austin to Llano.....	99.68		
	Burnet to Lampasas.....	23.01		
	Fairland to Marble Falls	6.40		
	Bremond to Ross.....	55.30		
	Mexia to Nollewa.....	94.06		
720	Garrett to Fort Worth...	52.83		
	Hutchins to Lancaster....	4.75		
	Total	789.01	1.27	242.16

No. 16—PROPRIETARY COMPANIES—INCOME ACCOUNT—YEAR ENDED JUNE 30, 1913.

Houston & Texas Central R. R. Co.

RECEIPTS.

Gross operating revenues and revenues from outside operations	\$6,849,653.28	
Rentals for joint tracks, yards, and terminal facilities	35,741.05	
Miscellaneous rentals	1,614.98	
Income from stocks and bonds owned	2,270.00	722
Income from lands and securities not pledged for redemption of bonds	3,898.00	
Interest on open accounts.....	42,601.06	
Total receipts	\$6,935,778.37	

DISBURSEMENTS.

Operating expenses and expenses of outside operations	\$5,515,316.51	
Taxes	231,516.04	723
Hire of equipment	525,391.50	
Interest on funded debt.....	634,430.00	
Interest on loans and advances other than on open accounts with S. P. Co. and Proprietary Companies	585.01	
Miscellaneous expenses	5,465.65	
Total Disbursements	\$6,912,704.71	
Balance—surplus	\$23,073.66	
Balance to Profit and Loss—surplus	\$23,073.66	

NO. 17—PROPRIETARY COMPANIES—PROFIT AND LOSS
ACCOUNT—YEAR ENDED JUNE 30, 1913.

Houston & Texas Central R. R. Co.

CREDIT.

	Balance June 30, 1913.....	\$17,166,566.81
	Income account—surplus (Table No. 16)	23,073.66
	Proceeds from sale of lands pledged 725 for redemption of bonds.....	140,000.00
	Collection of old accounts.....	67,627.08
	Adjustments in accounts	1,225.00
	Old accounts written off.....	2,601.91
	Total	\$17,401,094.46

DEBIT.

	Uncollectable accounts written off.	\$364.54
	Adjustments in accounts	350.44
	Dividends on common stock.....	300,000.00
726	Property abandoned not to be re- placed	3,376.61
	Payment of old accounts	87.21
	Balance to credit of general ac- count, June 30, 1913.....	17,096,915.66
	Total	\$17,401,094.46

No. 18—PROPRIETARY COMPANIES—ASSETS—JUNE
30, 1913.

Houston & Texas Central R. R. Co.

ASSETS.

Capital Assets.

Cost of road and franchises.....	\$39,413,539.52
Stocks owned (Table 20).....	48,400.00
Total	\$39,461,939.52

728

Current Assets.

Cash	\$92,581.04
Loans and notes receivable.....	55,769.50
Agents and conductors	97,099.15
Individuals and companies	202,444.49
U. S. Government transportation.	12,176.10
Material and Supplies	1,027,421.69
Total	\$1,487,491.97

Deferred Assets.

Individuals and companies	\$247,873.33
Total	\$247,873.33

729

Contingent Assets.

Unadjusted accounts	\$88,149.38
Individuals and companies	730.21
Traffic unadjusted	104,098.25
Total	\$192,977.84

Total Assets \$41,390,282.66

730

Complainants' Exhibit. //

 NO. 19—PROPRIETARY COMPANIES—LIABILITIES—
 JUNE 30, 1913.

Houston & Texas Central R. R. Co.

LIABILITIES

Capital Liabilities

	Capital Stock	\$10,000,000.00
	Funded and other fixed interest	
731	bearing debt (Table No. 9)...	12,594,000.00
		<hr/>
	Total	\$22,594,000.00

Current Liabilities.

	Coupons matured but not presented	\$2,505.00
	Coupons due July 1.....	101,400.00
	Interest accrued on bonds and	
	loans to June 30, but not due.	70,247.22
	Dividends due—unpaid	177.00
	Traffic and car service.....	45,395.44
732	Loans and notes payable.....	175,000.00
	Vouchers and pay rolls.....	875,335.51
		<hr/>
	Total	\$1,270,060.17

Deferred Liabilities.

	Individuals and companies	\$73,522.42
	Taxes assessed but not due.....	113,191.97
		<hr/>
	Total	\$186,714.39

Proprietary Companies.

Direct Navigation Co.....	\$3.00	
Galveston, Harrisburg & San Antonio Ry. Co.	51,233.06	
Houston, East & West Texas Ry. Co.	3,098.62	
Houston & Shreveport R. R. Co...	26,000.00	
Louisiana Western R. R. Co.....	1,605.01	
Morgan's Louisiana & Texas R. R. & S. S. Co.....	5,529.85	
Texas & New Orleans R. R. Co....	61,570.06	734
Southern Pacific Company	60,586.09	
Total	\$149,039.60	

Contingent Liabilities

Insurance fund	\$13,654.66	
S. P. Co. unadjusted accounts....	11,516.09	
Principal of deferred payments on land contracts	7,796.00	
Total	\$32,966.75	735
Profit and Loss (Table No. 17)	\$17,096,015.66	
Total liabilities	\$41,390,282.66	

No. 22—PROPRIETARY COMPANIES—LAND GRANT
ACCOUNTS—JUNE 30, 1913.

Trustees Houston & Texas Central R. R. Co.
Railway Lands.*

	Pledged for account of the following bonds:	
	BALANCE, June 30, 1912.....	\$541,594.49
	Receipts during the year:	
	Sales made for all cash.....	77,141.72
	First payment on time contracts....	640.00
737	Principal of deferred payments on time sales.....	1,920.00
	Interest collected on principal of de- ferred payments.....	32,114.96
	Interest on deposits.....	8,994.74
	Cash receipts from other sources....	979.73
	Total	\$121,791.15
	Total	\$663,385.64
	Disbursements during the year:	
	Cash paid to Trustees.....	\$303,007.03
	Land contracts surrendered.....	12,985.04
738	Receipts applied to payment of ex- penses	13,125.93
	Total	\$329,118.00
	BALANCE, June 30, 1913 (Princi- pal deferred payments).....	\$334,267.64
	Number of contracts issued.....	4
	Number of acres sold.....	640
	Average price received per acre.....	\$4.00
	Number of acres returned with contracts surrendered	5,232
	Acres remaining unsold at close of year	6,706

*Excepting the face value of bonds purchased and cancelled, none of these transactions are taken up on the accounts of the Houston & Texas Central Railroad Company.

No. 23—PROPRIETARY COMPANIES—TRUST FUNDS—
JUNE 30, 1913.

Trustees Houston & Texas Central R. R. Co.
Railway Lands.*

Pledged for account of the following bonds:

BALANCE, June 30, 1912..... \$10,626,338.97

Receipts during the year:

Cash from sales paid in full.....	\$77,141.72	
Cash from sales made on deferred payments	640.00	740
Principal of deferred payments col- lected	196,261.81	
Interest collected on principal of deferred payments.....	32,114.96	
Cash receipts from other sources..	9,974.47	
	<hr/> \$316,132.96	

Total \$10,942,471.93

Disbursements during the year:

Premium and accrued interest on bonds	†\$1,283.54	741
Principal refunded on lands in suit	1,983.08	
Land department expenses and taxes	13,125.93	

Total \$13,825.47

Balance \$10,928,646.46

*Excepting the face value of bonds purchased and cancelled, none of these transactions are taken up in the accounts of the Houston & Texas Central Railroad Company.

†Credit.

742

Complainants' Exhibit. //

Applied as follows:

Face value of bonds purchased and cancelled	\$10,433,000.00
Cost of bonds purchased and can- celled	\$10,433,000.00
Cash in hands of Trustees.....	495,646.46
Total	\$10,928,646.46

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No. 25—PROPRIETARY COMPANIES—CONDENSED
STATEMENT OF OPERATING INCOME
AND OPERATING EXPENSES—YEAR
ENDED JUNE 30, 1913.

Houston & Texas Central R. R. Co.

OPERATING INCOME.

Freight	\$4,472,254.32
Passenger	1,921,211.99
Mail	114,111.83
Express	164,811.32
744 Other transportation revenues.....	75,591.21
Revenues from operations other than transportation.....	80,667.66
Total—rail lines	\$6,828,648.33
Revenues—outside operations.....	21,004.95
Total gross operating income	\$6,849,653.28

OPERATING EXPENSES.**Maintenance of Way and Structures:**

Ballast	\$ 7,851.44	
Ties	166,146.94	
Rails	81,961.08	
Frogs, switches, and other track material	92,557.86	
Repairs of roadway and track.....	426,502.56	
Bridges, trestles, and culverts.....	47,528.48	
Buildings, grounds, and appurtenances	156,225.79	746
Electric power, telegraph and telephone lines.....	5,499.84	
Superintendence	63,418.44	
Stationery and printing.....	2,257.77	
Other expenses.....	9,716.43	
Total	\$1,059,666.63	

Maintenance of Equipment:

Locomotives	\$577,895.06	
Passenger train cars.....	127,456.20	
Freight train cars.....	355,656.97	
Work equipment.....	3,803.90	747
Shop machinery and tools.....	34,029.98	
Superintendence	54,099.17	
Other expenses.....	9,589.17	
Total	\$1,162,530.45	

Traffic Expenses:

Outside agencies.....	\$147,375.62	
Advertising	22,422.96	
Superintendence	36,820.10	
Stationery and printing.....	13,069.58	
Other expenses.....	1,059.48	
Total	\$220,747.74	

748

Complainants' Exhibit. //

Transportation Expenses:

Locomotives, fuel for.....	\$778,429.72
Locomotive service, other than fuel	620,242.04
Train service.....	453,961.58
Station and terminal service.....	583,459.43
Injuries, loss, damage, and other casualties	290,351.71
Superintendence	84,429.33
Stationery and printing.....	18,215.51
Other expenses.....	6,500.71

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Total	\$2,835,590.03
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General Expenses:

Salaries and expenses of general officers	\$24,368.41
Salaries and expenses of clerks and attendants	70,631.73
Law expenses.....	44,553.40
General office expenses.....	14,702.57
Stationery and printing.....	8,463.94
Insurance	25,527.24
750 Pensions	8,783.31
Other expenses.....	7,563.29

Total	\$204,593.89
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Total operating expenses.....	\$5,483,128.74
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Expenses—outside operations.....	32,187.77
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Total expenses.....	\$5,515,316.51
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Net operating income.....	\$1,334,336.77
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Complainants' Exhibit //

751

No. 27—PROPRIETARY COMPANIES—ADDITIONS AND
BETTERMENTS—YEAR ENDED JUNE 30, 1913.

Houston & Texas Central R. R. Co.

Right of way and station grounds..	\$12,237.00	
Widening cuts and fills.....	75.68	
Protection of banks and drainage....	35.00	
Grade reductions and changes of line	7,561.68	
Bridges, trestles and culverts.....	24,179.24	
Increased weight of rail.....	44,405.74	
Improved frogs and switches.....	2,278.15	752
Track fastenings and appurtenances..	32,593.11	
Ballast	15,656.33	
Sidings and spur tracks.....	66,630.51	
Terminal yards.....	14,902.44	
Fencing right of way.....	303.21	
Interlocking apparatus.....	29.77	
Telegraph and telephone lines.....	921.08	
Station buildings and fixtures.....	20,882.25	
Shops, enginehouses and turntables..	34,020.88	
Shop machinery and tools.....	24,522.17	
Water and fuel stations.....	28,448.60	
Equipment	71,925.45	753
Other additions and betterments....	4,165.91	
<hr/>		
Total	\$405,774.20	
Less: Abandoned property.....	6,459.23	
<hr/>		
Total additions and betterments	\$399,314.97	
<hr/>		
Balance charged to capital account..	\$399,314.97	

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Complainants' Exhibit //

**NO. 35—PROPRIETARY COMPANIES—ROLLING STOCK
OWNED—JUNE 30, 1913.**
Houston & Texas Central R. R. Co.**ROLLING STOCK.**

Locomotives:	
Standard guage.....	100
<hr/>	
Total	100
755 Passenger—Train Cars:	
Baggage—wood	19
Baggage and mail—wood.....	18
Baggage and passage—wood.....	5
Business—wood	2
Chair—wood	18
Instruction—wood	1
Passenger—wood	42
Passenger—steel	7
Postal—steel	2
<hr/>	
Total	114
756 Freight—Train Cars:	
Box—wood	473
Box—steel underframe.....	445
Caboose—wood	46
Flat—wood	293
Gondola—wood	105
Gondola (drop bottom)—steel.....	299
Refrigerator—wood	35
Stock—wood	87
Tank—wood	4
<hr/>	
Total	1,787

Work Equipment:

Ballast distributing.....	1	
Boarding	104	
Derrick	4	
Pile drivers.....	3	
Roadway gondola.....	14	
Roadway water cars and auxiliary tenders..	7	
Steam shovels.....	2	
Tool	4	
Miscellaneous	4	
		758
Total	143	

**Complainants' Exhibit 12 on Trial of
Main Issue.**

WHEREAS, under agreements dated November 20, 1889, and September, 1890, the minority stockholders of the Houston & Texas Central Railway Company, appointed the undersigned and Andrew S. McClelland, of Glasgow, Scotland, a committee to represent and protect their interests in all actions, suits, agreements and proceedings then or thereafter taken or to be taken; and

WHEREAS, under the said agreements it is provided that in the event of the death of any member of the committee, the surviving members of the committee may select a successor from among the stockholders subscribing either of said agreements; and

WHEREAS, the said Andrew S. McClelland has died, and the undersigned survivors of the com-

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mittee desire, in pursuance of said agreements to appoint Russell H. Landale, who is a subscribing stockholder to said agreement of September, 1890, a member of said committee, in place and stead of said Andrew S. McClelland deceased.

761

NOW, THEREFORE, we, the undersigned, surviving members of the committee of minority stockholders of the Houston & Texas Central Railway Company, do hereby appoint Russell H. Landale, of New York City, a member of said committee, in place and stead of Andrew S. McClelland, deceased.

his

R. B. X Whitteman

mark

Henry Fitch.

Witness to mark

T. Bennett

James N. Timmerman,
as to H. Fitch.

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State of Ohio,
County of Summit, } ss. :

On this 2nd day of Oct., 1914, before me personally came R. B. Whitteman, to me known and known to me to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

FRANCIS SEABURY,
Notary Public.

State of New York, }
 County of New York, } ss.:

On this Fourth day of November, 1914, before me personally came Henry Fitch to me known and known to me to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

JAS. TIMMERMANN,

Notary Public,

Bronx Co.,

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Certificate filed in New York Co. No. 53.

**Complainants' Exhibit 13 on Trial of
Main Issue.**

"WHEREAS, under agreements dated November 20th, 1889, and September, 1890, the minority stockholders of the Houston & Texas Central Railway Company appointed a committee of three members to represent and protect their interests in said railway company, and provided that in the event of the death of any member of the committee, the surviving members should select a successor from among the stockholders subscribing either of said agreements; and

765

WHEREAS, ANDREW S. McCLELLAND, one of said committee, is deceased, and as I am a stockholder of said railway company, and a subscriber of the said agreement of 1890, the survivors of the committee, in pursuance of the authority vested in them, have appointed me a member of said committee in place and stead of said ANDREW S. McCLELLAND, deceased;

NOW, THEREFORE, I herewith accept the said appointment as a member of the committee of minority stockholders of the Houston & Texas Central Railway Company, and do hereby agree to serve upon the said committee.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 12th day of November, Nineteen hundred and fourteen.

In presence of:

RUSSELL H. LANDALE (L. S.)

State of New York,
City and County of New York, } ss.:

On this 12th day of November, Nineteen hundred and fourteen, before me personally came Russell H. Landale, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

HARRY B. SAWIN,
Notary Public 3662,
New York County."

**Defendant's Exhibits A, B, C, D, E and
F on Trial of Main Issue.**

(NOTE)—These exhibits are the same as Defendant's Exhibits of the same respective letters introduced on the hearing on the Separate Defenses herein and are not printed here for the reason that they are provided for in connection with the said hearing at pages 181 to 182 of this record.

**Defendant's Exhibit G on Trial of
Main Issue.**

769

Friday, May 17, 1889.

#7377.

THE LACKAWANNA IRON & COAL
COMPANY

VS.


THE HOUSTON & TEXAS CENTRAL
RAILWAY COMPANY.

770

This day came the plaintiff by its attorney, and the defendant having failed to appear and answer in this behalf, although duly cited, and having wholly made default; wherefore the said Lackawanna Iron & Coal Company ought to recover against the said Houston & Texas Central Railway Company its damages by occasion of the premises; and it appearing to the Court that the cause of action is liquidated and proved by an instrument of writing, it is ordered that the Clerk do assess the damages sustained by said Plaintiff; and the said Clerk now here having assessed the damages aforesaid at the sum of Five Hundred & Fifty Five Thousand Nine Hundred and Fourteen 25/100 Dollars (\$555,914.25) it is ordered, adjudged, and decreed that the said plaintiff do have and recover of the said defendant the sum of Five Hundred and Fifty Five Thousand Nine Hundred and Fourteen 25/100 Dollars, with interest thereon at the rate of eight per cent per annum from the date of this judgment, together with his costs in this behalf expended, and that he have his execution.

771

772

Defendant's Exhibit. 

The State of Texas,
County of Dallas.

I, H. H. Williams, Clerk of the District Courts, in and for the County of Dallas, State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment in the above numbered and styled cause, as the same appears of record in Book X, page 73, of the Minutes of the 14th Judicial District Court, in and for Dallas County, Texas.

773

I further certify that the records in my office show that on August 19th, 1889, execution was issued in the within cause to Dallas County, Texas, and that said execution was returned "Nulla Bona" and that no further execution or executions have been issued in said cause.

office in the City of Dallas, Dallas County, Texas,

WITNESS my official seal and signature in
on this the 22nd day of October, 1914.

774

H. H. WILLIAMS,
Clerk District Courts,
Dallas County,
Texas.

[Seal]

By T. J. HUNT,
Deputy.

**Defendant's Exhibit H on Trial of
Main Issue.**

775

Friday, May 17, 1889.

#7376.

THE SOUTHERN DEVELOPMENT
COMPANY

vs.

THE HOUSTON & TEXAS CENTRAL
RAILWAY COMPANY.

776

This day came the plaintiff by its attorney, and the defendant having failed to appear and answer in this behalf, although duly cited, and having wholly made default, wherefore the said Southern Development Company ought to recover against the said Houston & Texas Central Railway Company its damages by occasion of the premises; and it appearing to the Court that the cause of action is liquidated and proved by an instrument of writing, it is ordered that the Clerk do assess the damages sustained by said Plaintiff, and the said Clerk now here having assessed the damages aforesaid; at the sum of Eight Hundred and Fifty Eight Thousand One Hundred and Thirteen 15/100 Dollars (858,113.15) it is ordered adjudged and decreed that the said plaintiff do have and recover of the said defendant the sum of Eight Hundred and Fifty Eight Thousand One Hundred and Thirteen 15/100 Dollars, with interest thereon at the rate of eight per cent per annum from the date of this judgment, together with his costs in this behalf expended, and that he have his execution.

777

778

Defendant's Exhibit 17

The State of Texas,
County of Dallas.

I, H. H. Williams, Clerk of the District Courts, in and for the County of Dallas, State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment in the above numbered and styled cause, as the same appears of record in Book X, page 72, of the Minutes of the 14th Judicial District Court, in and for Dallas County, Texas.

779

I further certify that the records in my office show that on August 19th, 1914, execution was issued in the within cause to Dallas County, Texas, and that said execution was returned "Nulla Bona" and that no further execution or executions have been issued in said cause.

WITNESS my official seal and signature at office in the City of Dallas, Dallas County, Texas, on this the 22nd day of October, 1914.

780

H. H. WILLIAMS,
Clerk District Courts,
Dallas County,
Texas.

[Seal]

By T. J. HUNT,
Deputy.

Defendant's Exhibit I on Trial of 781
Main Issue.

Friday, May 17, 1889.

#7375

THE MORGAN'S LOUISIANA &
 TEXAS RAILROAD & STEAMSHIP
 COMPANY

VS.

THE HOUSTON AND TEXAS
 CENTRAL RAILWAY COMPANY.

782

This day came the Plaintiff by its attorney, and the Defendant having failed to appear and answer in this behalf, although duly cited, and having wholly made default; Wherefore, the said Morgan's Louisiana & Texas Railroad & Steamship Company ought to recover against the said Houston & Texas Central Railway Company its damages by occasion of the premises; and it appearing to the Court that the cause of action is liquidated and proved by instruments of writing; it is ordered that the Clerk do assess the damages sustained by said Plaintiff; and the said Clerk now here having assessed the damages aforesaid at the sum of One Million Seven Hundred and Ninety Five Thousand Five Hundred and Seventy 81/100 Dollars (\$1,795,570.81) it is ordered adjudged and decreed that the said plaintiff do have and recover of the said defendant the sum of One Million Seven Hundred and Ninety Five Thousand Five Hundred and Seventy 81/100 Dollars, with interest thereon at the rate of eight per cent per annum from the date of this judgment, together with his costs in this behalf expended, and that he have his execution.

783

784

Defendant's Exhibit. I

The State of Texas,
County of Dallas.

I, H. H. Williams, Clerk of the District Courts, in and for the County of Dallas, State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment in the above numbered and styled cause, as the same appears of record in Book X, page 72, of the Minutes of the 14th Judicial District Court, in and for Dallas County, Texas.

785

I further certify that the records in my office show that on August 19th, 1889, execution was issued in the within cause to Dallas County, Texas, and that said execution was returned "Nulla Bona" and that no further execution or executions have been issued in said cause.

WITNESS my official seal and signature at office in the City of Dallas, Dallas County, Texas, on this the 22nd day of October, A. D. 1914.

786

H. H. WILLIAMS,
Clerk District Courts,
Dallas County,
Texas.

[Seal]

By T. J. HUNT,
Deputy.

Opinion on Trial of Main Issue.

787

(Filed July 30, 1915.)

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY.
Defendant.

788

CHATFIELD, J.:

This case arises from circumstances which have been considered in various litigations since the year 1892. Many of the facts are set forth in the opinions of *Lawrence vs. Southern Pacific Co.*, 180 Fed., 822, *Bogert as Executor vs. Southern Pacific Co.*, 228 U. S., 137, and *Bogert vs. Southern Pacific Co.*, 215 Fed., 218.

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On page 221 of the last mentioned opinion, the suits and proceedings had are set forth in detail chronologically, and substantially all of the testimony in the present record is somewhere discussed or referred to in these various cases. But it is necessary in considering the present action to have before us a synopsis of the circumstances upon which the alleged cause of action is based.

The Houston and Texas Central Railway Co., organized under the laws of Texas, operated three lines in that state, with some one thousand miles of track. The Main Line comprised 345 miles. The

791

Western Division covered 118 miles of track, while the Waco & North Western Division comprised about 100 miles. Certain branches added 250 miles of track and 200 miles of sidings. The entire authorized amount of stock was 100,000 shares of which 77,269 shares were actually issued. Public land had been granted by the state of Texas equal to 10,240 acres for each mile of road built or about 4,500,000 acres in all. A majority of the stock was acquired by the Morgan's Louisiana and Texas Railroad and Steamship Co., in 1877. A majority of the stock of the Morgan Company was sold to The Southern Development Co., and in 1885 this stock of the Morgan Company was sold to the Southern Pacific Co., which thus indirectly controlled and owned a majority of the stock of the Houston and Texas Central Railway Co.

792

Eight of the nine directors of the Railway Company for four years preceding 1888 were either officers or directors of the Southern Pacific Co., or its subsidiary companies. A mortgage to secure bonds amounting to \$5,838,000 was held by Messrs. Easton and Rintoul as trustees against the property of the Main Line of the Texas and Houston Central Railway. Interest upon this mortgage was unpaid and in 1885 suit was brought in the Federal Court of Texas asking an injunction to secure payment of certain moneys into the sinking fund. No foreclosure or sale of the property to pay the principal was then asked, for the mortgages did not become due until 1888. Nor did the trustees seek to take over the Railroad Company for default in the payment of interest, although this right was given them by their mortgage. The Railway Company filed an answer denying that the earnings of the Railway were enough to provide for a sinking

fund and alleging the filing of a bill by The Southern Development Co., which claimed to be a general creditor to the amount of some two million dollars and which asked for the appointment of a receiver. Receivers were appointed in The Southern Development Co., action, upon February 22, 1885. In July 1885 an answer was filed by the Railway Company admitting the allegations of the bill of the trustees Easton and Rintoul. In October, 1885, Easton and Rintoul as trustees demurred to the bill of the Southern Development Co., and in May 1886, this demurrer was sustained and that bill dismissed.

794

In the meantime, Easton and Rintoul as trustees also of a mortgage upon the Western Division, also brought suit asking substantially the same relief as with respect to the mortgage upon the Main Line. The Railway Company's answer was similar to its answer to the suit upon the Main Line mortgage.

On March 18, 1885, the Farmers' Loan and Trust Co. of New York, as trustee under three mortgages upon the various lines of the Railway Company, filed a bill asking for a receiver, in which it was not alleged that the principal was due, but in which a sale of certain of the lands received from the State of Texas for a sinking fund was prayed, and in this bill it was alleged that the Railway Company had violated its obligation to sell this land in payment of their floating debts and other expenses. The right to enter and take possession until the arrears of interest were discharged was alleged. On June 22, 1885, the Railway Company answered the Farmers' Loan and Trust Company's Complaint, denying the misapplication of funds and claiming that the funds received from the lands had been applied under the terms of the mortgage. On January 21,

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1886, Easton and Rintoul, as trustees, filed a foreclosure bill, based upon the Main Line mortgage, alleging the control by The Southern Development Co. of the Railway Company and the institution of the suit by The Southern Development Co. against the Railway Company in which receivers had been appointed. It was alleged that this was collusive and the prayer for judgment asked that the principal of the bonds be declared due and payable.

797

The Railway Company filed an answer to this bill, claiming that the principal of the mortgage was not due and that no foreclosure for non-payment of interest, or even for payment of principal when due, could be had until the public lands were first sold and a deficiency established. It was also alleged that if the lands were carefully administered, they should pay the floating debt and the interest; and principal of the bonded debt when due.

798

Also, upon the 21st day of January, 1886, Easton and Rintoul as trustees filed a bill for foreclosure of the consolidated mortgage upon the Western Division. The allegations were the same as in the suit upon the Main Line mortgage and the answer of the Railway Company was also similar to the one in that action. On April 24, 1886, the Farmers' Loan and Trust Co. as trustee of the general mortgage above referred to, filed a bill reciting the above suits and praying that the Railway Company pay into court the interest and arrears, or in default, that the lands of the company be sold. In case of deficiency, sale of the other property of the Railway Company was asked, and also that judicial sale be had as the rights of all the parties could not be fully protected otherwise. This general mortgage also did not provide for foreclosure for non-

payment of interest but for non-payment of the principal when due, and then only after sale of the lands with a deficiency.

The Main Line mortgage was not due until after 1888. On May 26, 1886, by consent, the three foreclosure suits were consolidated and Messrs. Easton, Rintoul and Dillingham appointed receivers of the entire property. Upon the next day, May 27th, the demurrer of Easton and Rintoul to the action brought by The Southern Development Co. was sustained and Clark and Dillingham as receivers therein were directed to turn over the property to Messrs. Easton, Rintoul and Dillingham as receivers in the consolidated action. Other parties were brought in by amendments and upon August 2, 1886, the Farmers' Loan and Trust Co. filed an answer to the bill filed January 21, 1886, by Easton and Rintoul for the foreclosure of the Main Line mortgage.

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This answer denied that the principal of that mortgage was due and set up the same defenses as those urged by the Railway Company, and also to the effect that the first mortgage upon the Main Line covered but a part of the system and could not be foreclosed without injustice to other parties.

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It was further urged as a defense, that the only right possessed was to collect the interest in arrears by a sale of the lands before the sale of the Railway Company, and that the proceeds from the sale of the land would be sufficient, if properly administered, to pay the bonds issued under the Main Line mortgage.

On the same day, the Farmers' Loan and Trust Co. filed an answer to the suit by Easton and Rintoul to foreclose the Western Division mortgage raising the same issues.

On September 3, 1886, the Railway Company filed an answer to the bill of complaint of the Farmers' Loan and Trust Co. for foreclosure of the general mortgage, in which it was denied that the covenants with relation to the sinking fund had been broken or that any unlawful sales of land had been made.

On April 30, 1888, a bill was filed to foreclose the Income and Indemnity mortgage alleging default in the principal and interest of the bonds secured by that mortgage, which was answered by the Railway Company, and on May 2, 1888, by the Farmers' Loan and Trust Co. On the same day it filed cross-bills in the suits on the Main Line and Western Division consolidated mortgage and on the Waco and North Western Division consolidated mortgage.

During the year preceding December 20, 1887, negotiations were under way with respect to these suits. A draft reorganization agreement was prepared and ultimately agreed upon by:

(1) The holders of the Main Line First Mortgage Bonds;

(2) Holders of the Western Division First Mortgage Bonds;

(3) Holders of the Waco and North Western Division First Mortgage Bonds;

(4) Holders of bonds of the Consolidated Mortgage on the Main Line and Western Division;

(5) Holders of bonds of the Consolidated Mortgage on the Waco and North Western Division;

(6) Holders of General Mortgage Bonds;

(7) The defendant herein, Southern Pacific Company;

(8) Central Trust Company of New York.

The first six parties were bondholders, the seventh party was the owner of the majority stock of the Railway Company, and the eighth party was interested to the extent of undertaking to carry out the reorganization agreement.

The minority stockholders of the Texas and Houston Railway Co. are shown nowhere in the records to have had notice of or been parties to the negotiations until after foreclosure decree had been had. The reorganization agreement provided that all existing mortgages were to be foreclosed and a new company organized to take over all the property and franchises of the Railway Company.

The defenses interposed were not to be relied upon and the Central Trust Co. was to act as purchasing trustee, with power in its option to declare the principal of the bonds, deposited under the reorganization agreement, to be due, and to assist in the prosecution of or to become a party to any suits then pending or which might thereafter be brought.

All of the mortgages referred to (except the Income and Indemnity mortgage) had still some years to run, and none of these (except the Income and Indemnity mortgage) contained a provision for the foreclosure and sale of the road, except for non-payment of the principal of the mortgage.

The Income and Indemnity bonds had previously been exchanged for general mortgage bonds and were held by the Farmers' Loan and Trust Co. as collateral therefor. The suit on these Income and Indemnity bonds was begun upon April 30,

1888, as a part of the reorganization plan. Upon May 1st, the Railway Company filed an answer admitting the allegations of this bill, and on May 2nd the Railway Company answered the cross-bills of the Farmers' Loan and Trust Co. in the other actions. On May 4th decree of foreclosure and sale was entered in the consolidated actions.

The consent of the Railway Company to declare the principal due of the bonds which might be deposited was given by the Southern Pacific Co., controlling a majority of the stock of the Railway Company, and consent was likewise given, in the reorganization agreement, to the Central Trust Co. to form the new corporation to which was to be conveyed all of the property purchased by the Central Trust Co. as trustee. New bonds were to be issued, and the new corporation was to issue 100,000 shares of stock of the par value of ten million dollars. All of this stock was to be given to the Southern Pacific Co., unless taken up at the terms offered, by the creditors holding the floating debts and by the holders of stock in the Railway Company.

It is alleged that under this agreement, the Southern Pacific Co. intended to obtain possession of the Railway Company by freezing out, through impossible terms, the minority stockholders, unless they purchased the new stock at the pro rata price to be later fixed by the Central Trust Co. so as to realize a sufficient amount to discharge the floating debt, the charges and expenses of reorganization, and the amount required for the holders of the mortgage bonds.

It is also alleged that the Southern Pacific Co. was to be allowed to take up all the stock not taken over by the creditors or minority stock-

holders who should accept the proposition just referred to, upon payment merely of the cash required for the bonus to the holders of the first mortgage bonds and the necessary expenses of reorganization.

It is further alleged that the amount which would have to be paid by the Southern Pacific Co. for this purpose was but \$26 a share, while the amount that the minority shareholders would have to pay for the same stock was fixed finally at \$71.40 a share. The result of this was that no stockholder or floating debt creditor undertook to pay for and take over a single share of the stock of the new company, and the Southern Pacific Co. took the whole issue of ten million dollars of stock at the price of \$26 a share. The bondholders were actuated in accepting the new bonds by the improvement in their security through the ownership of all the property by the new company, and the ownership of the stock of that company by the Southern Pacific Co., as a part of its general system, while the old mortgages had nothing back of them except the property of the Houston and Texas Central Railway Co.

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The Southern Pacific Co., owning the stock of and controlling The Southern Development Co., and having obtained from it the stock of the Morgan's Steamship Co., which in turn owned a majority of the Houston and Texas Central Railway Co., was in a position to waive and in fact to relinquish substantially all claims for the floating indebtedness which had accumulated against the Houston and Texas Central Railway Co. as the amount of those debts had been advanced to a large extent by The Southern Development Co. or the Morgan's Steamship Co., or by the Southern Pacific Co. itself.

It is evident that the proposition to reorganize, and to exchange bonds at a lower rate of interest, might be the best solution, from the standpoint of bondholders who had been unable to depend upon the payment of the larger rate of interest by the smaller and more helpless company. The new bonds were a more attractive proposition from every standpoint except the rate of interest offered.

815

The general or floating debt holders, however, if unable to buy in or protect the property at foreclosure, and if unable to secure the payment of their debts from the land owned by the Railway, which land was also to be included in the foreclosure, would of course assent to a reorganization proposition, by which the entire property of the company would be turned over to the company owning these holders of general debts, subject to the payment of the reorganization expenses.

816

This in effect is what the reorganization meant to the Southern Pacific Co. through its control of The Southern Development Co. and the Morgan's Steamship Co. If perchance any of the minority or outside stockholders wished to share in the benefits of the reorganization, they were allowed to do so only upon paying their pro rata share of the total indebtedness as well as their share of the reorganization expenses. At the same time, the majority stock in the hands of the Southern Pacific Co. would of course offset and possibly furnish a large profit, if balanced against the amount of loss to the Southern Pacific Co. through depreciation in the stock or surplus of The Southern Development Co. or the Morgan's Steamship Co.

As the matter turned out, none of the minority stockholders were able or were willing to pay the amount by which they would have been allowed to

join the Southern Pacific Co. in sharing the benefits of purchasing the entire property of the Houston and Texas Central Railway Co. at the price of the reorganization expenses. The general creditors who were parties to the suit and who had acquired judgments, then unsatisfied of record, were wiped out by the foreclosure decree.

The reorganization agreement was prepared under the direction and apparently after much negotiations of the attorneys for the Southern Pacific Company's directors and officers with the representatives of the bondholders. The rights of the stockholders of The Southern Development Co., of the Morgan's Steamship Co., and of the Houston and Texas Central Railway Co., were all supposedly taken care of by those who were interested in securing a reorganization, from the standpoint of the Southern Pacific Co. or the bondholders.

It would appear that some representatives of the minority stockholders had knowledge of the matter before the sale under foreclosure, but during the negotiations as to the reorganization agreement and even after the arrival of the New York representatives of the Southern Pacific Co. and of the various bondholders, in Texas, it is evident from the record that no notice was given to or had by the minority stockholders, of the proposed plan of reorganization, until the litigation had been disposed of by what was in effect a consent decree or submission of facts for the entry of a decree, if approved by the court; and but one day intervened, after the various foreclosure suits were gotten in condition for hearing, and before a decree of foreclosure and sale, in the consolidated action, was entered upon the consent of the majority stockholders of the Houston and Texas Central Rail-

way Co., and of all the various parties representing the corporations and the bondholders as a class.

821

The provision in the agreement, that the minority stockholders would be allowed to share in the benefits if they undertook to carry their share of the entire burden, made the decree appear to the court sufficient protection, and if the court had had the precise question now raised presented, the chances are that the result of the foreclosure actions would have been the same as that which then occurred. In other words, the property of all railroad lines affected by the mortgages was to be sold and the mortgages and judgment liens wiped out. A reorganization was to be effected. The Southern Pacific Co. was to purchase the property, while the rights of the minority in that property were admitted by the Southern Pacific Co. The only room for argument would have been the amount which the Southern Pacific Co. could exact from the minority stockholders, and as this was to be computed, or in other words, to be determined in the future, the obligation of the Southern Pacific Co. to do this properly, and to respect the legal rights of the minority stockholders, was recognized in the foreclosure decree, and that decree could not be invalidated by subsequent violation of this obligation on the part of the Southern Pacific Co., but the defenses which could have been urged for protection of the minority stockholders as well were withdrawn and their rights left in the hands of the purchaser, which thereby assumed their protection.

822

Under these circumstances, the minority stockholders attempted to attack the foreclosure suits and were defeated, although the case, as has been

stated, was carried up on appeal and consumed a number of years before final determination (Carey Case, 45 Fed., 438, 9 C. C. A., 687, 161 U. S., 115).

They then brought suit in the Supreme Court of the State of New York to attack the amount which the Southern Pacific Co. required them to pay as a part of the expenses in return for being allowed to share in the reorganization agreement. The Supreme Court of New York decided that the amount of the expenses charged against the minority stockholders, and the position in which they found themselves placed, could not be used as a basis for collaterally attacking the proceedings in the foreclosure suit in the United States Circuit Court in Texas (*Gernsheim vs. Olcott*, 7 N. Y. Suppl., 872; *Gernsheim vs. Central Trust Co.*, 61 Hun, 625).

824

But, again, much time was consumed and during the same period another action (called the Mac-Ardell Case) was begun in the Supreme Court of the State of New York, and carried to the Court of Appeals, where a majority of the court, in an opinion printed in 189 N. Y., page 368, held that an action by minority stockholders, to obtain property purchased under foreclosure, by a reorganization plan, carried out with the consent of the majority stockholders, was what is known as a representative action, in the sense that the validity of the foreclosure suit was involved and that the minority could not thus collaterally attack the jurisdiction of the court having granted the judgment in foreclosure, and question the action of the majority stockholders. The court said, that the appellants have abandoned their complaint of fraud and collusion against the corporation, and that inferentially they were assuming the validity

825

of the transfers as against the corporation and affirming the effect of the foreclosure sale; that they were in fact seeking nothing than to "impress upon the interest of the Southern Pacific Company in the shares of the new company and in the lands a trust obligation to account for profits to its associate stockholders."

827

But the court said, that such an action was "far outside the nature and limits of an action brought in behalf of a corporation against many defendants as alleged workers of fraud and conspiracy whereby the corporation has been stripped of its property."

The action was therefore dismissed. Two judges dissented, holding that the question was presented whether the minority stockholders were entitled to work out, through the old Houston and Texas Central Railway Co., their claim that by the terms of the reorganization agreement the Southern Pacific Co. had been permitted to appropriate the whole consideration without regard to the rights of the minority stockholders.

828

The dissenting judges said, further (page 390) :

"It is apparent that any claim the minority stockholders have in equity and by way of lien against the Southern Pacific Company can only be worked out through the old company and in an action where all the parties in interest are represented, as in this case,"

The dissenting judges again said, that the position of the plaintiffs was not inconsistent with the finding that the purchasers at the foreclosure sale acquired a good title.

The minority stockholders having thus been pointed to a way in which, according to the major-

ity opinion of the court, some action in equity might be stated against the Southern Pacific Co., and according to the minority opinion, some action through the old corporation might be had without regard to the sale of the property in the foreclosure action, brought suit in this court, attempting to allege that the Houston and Texas Railway Co. had in some manner or other been deprived of its rights through the decree of foreclosure and the sale had thereunder, and that the minority stockholders were entitled to enforce those rights as against the majority stockholders, or the Southern Pacific Co., into whose hands the majority of the stock was directly traced, and for whom the Central Trust Co., and Mr. Olcott, who had purchased and held the lands in trust, were acting.

830

This suit was dismissed in *Lawrence vs. Southern Pacific Co.*, 180 Fed., 822, because this court felt that the precise action, discussed by the two dissenting judges in the Court of Appeals in the *MacArdell Case*, could not be maintained without the presence of the Houston and Texas Central Railway Co. Even if the presence of that company could be secured, it might well be doubted whether the rights of the minority stockholders could be worked out in a representative action, where the corporation in which they owned stock had obtained the benefit of release from its general obligations of debt, and also from all of its various mortgage indebtedness, in return for the giving of a new mortgage of sufficient amount to produce funds to pay the various claims.

831

But be that as it may, the present action was instituted by complaint, which, as finally amended, charges in effect that the Southern Pacific Co. was

the majority stockholder, and secured, by means of the various foreclosure suits and the reorganization agreement, the entire property of the Houston and Texas Central Railway Co., through purchase under foreclosure, under such circumstances that the majority stockholder was bound to respect the rights of the minority stockholders, and to give the minority stockholders a share in any benefit which might accrue, without imposing such burdens as to of themselves furnish a breach of trust.

833

It will be seen that the present action recognizes the foreclosure suit and decree as giving the Circuit Court of the United States the right to transfer the property and to give good title to the property to the purchaser. It recognizes that validity of this foreclosure action cannot be attacked collaterally. The amount charged as expenses can only be attacked through any alleged collusion or improper consent carried into the decree of the foreclosure action itself. It recognizes that the Houston and Texas Central Railway Co. has no interest in the relations of the majority stockholder to the minority, or in the duties and obligations of that majority stockholder, through the acquisition of property to which the purchaser for the Southern Pacific Co. has acquired good title, but by which purchase it is claimed it has assumed certain obligations.

834

In the present action, the difficulties standing in the way of the various foreclosure suits, when fought by the Railway Company, and before the majority stockholder assented, are not urged as grounds of invalidity in the result of the foreclosure action, but as evidence that the majority stockholder intended to acquire title to the property in such a way as to assume obligations to the

minority stockholders, and the question at issue is whether or not it has lived up to those obligations, and whether or not the minority stockholders have a cause of action in case of its failure so to do.

The complaint alleges that the Southern Pacific Co. received the entire issue of ten million dollars of stock, representing the property of the Houston and Texas Central Railway Co. as trustee, that the minority stockholders have certain rights which they can enforce against the trustee who bought in the lands and property, and they ask this Court to compel the Southern Pacific Co. to account for that stock and all profits and earnings earned therefrom, for the benefit of all stockholders who come into and contribute to the expenses of this action. They ask that the Southern Pacific Co. be credited with the moneys actually paid out in connection with the reorganization agreement, and that the balance be distributed ratably to the stockholders according to their holdings of stock.

836

The defendant has urged the various defenses which have been previously heard as pleas in bar. The disposition made upon the former hearing (reported in 215 Fed., 218) need not be discussed and will be reaffirmed. Nothing has been presented at final hearing which makes any difference with respect thereto, and it becomes more evident as the entire record is considered, that the Houston and Texas Central Railway Co. is not a necessary party to this action, nor would it have the same rights as the minority stockholders, even if present. In other words, this suit seems not to be at all, in its present form, what is known as a representative action.

837

The defendant urges the validity of the foreclosure suit and disavows collusion or fraud. As has been already stated, the action of the United

838

States Circuit Court in ordering foreclosure and sale seems to have been well founded in law and proper under the circumstances. The Southern Pacific Co., through its control of a majority of the stock, by its substantially complete ownership of the Southern Development Co. and also of the Morgan's Steamship Co., occupied actually, in equity, the position of majority stockholder of the Houston and Texas Central Railway Co. It, therefore, had the right to and did actually act as such majority stockholder in agreeing upon the form of the foreclosure decree and sale.

839

The plaintiffs allege that under the terms of the mortgages, other than that of the Income and Indemnity mortgage, no sale of the property could have been ordered, until default in payment of the principal.

The defendant urges that the provisions of these mortgages simply prevented a sale by the trustees, but that the Court had inherent power to order a sale either in payment of debts or of back and over-due interest. *Guaranty Trust Co. vs. Green Cove R. Co.*, 139 U. S., 137; *Chicago and Vincennes R. Co. vs. Fosdick*, 106 U. S., 47.

840

The defendant alleges, therefore, that the Houston and Texas Central Railway Co. had not, through any substantial defense, delayed or held off foreclosures. But it is evident even if the Court might have, under the laws of the State of Texas, upon the proper finding of facts, ordered a sale of the property, it did not do so, and that the foreclosure was ultimately had upon the agreement of the parties, and upon presentation of facts satisfying the Court that one sale of the entire property was proper and within the rights of the parties appearing before the court.

Hence, the admission by the plaintiffs that the foreclosure suit must stand, in all respects, and the Southern Pacific Co. is, in effect, the majority stockholder purchasing at a valid foreclosure sale, brings us immediately to the question whether, in so doing, they had the right to cut off the minority stockholders from a share in the property purchased unless those minority stockholders agreed to join in reimbursing the general creditors of the corporation and to assume all the obligations which would be wiped out by the sale in foreclosure, under any one of the mortgages, or under the aggregate mortgages against the property of the Railway Company.

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The defendant in effect says that while the foreclosure suit was valid and cannot be set aside, and while thereby all debts against the corporation were disposed of as liens against its property, that nevertheless these debts have been preserved and have not been outlawed or paid off by agreement and wiped out by decree in the course of the reorganization proceedings. They reach this conclusion because the Southern Pacific Co. controlled these creditors of the Houston and Texas Central Railway Co., and thereby furnished the consent of these creditors to have the principal of the mortgages declared due, and to have their own claims against the property wiped out, thus giving up any right of action against the Houston and Texas Central Railway Co., in return for the right to purchase the property at the price of the expense of reorganization alone.

843

The defendant, therefore, urges that if the plaintiffs, coming into equity, seek to impress a trust upon the property in the hands of the defendant, they must reinstate the obligations of the general

creditors and must recognize the claim of those obligations against any property of the corporation which would, in the hands of the corporation, give value to the shares of stock.

The defendant, therefore, itself seeks to open the effect of the foreclosure decree, in so far as it terminated the rights of the general creditors to insist upon having the lands of the railway company sold for the payment of the mortgage liens and also of their claims, and hence to reinstate these claims as payable out of the proceeds of those lands.

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The defendant thus also seems to waive the presence of the Railway Company as a party and to urge that even in the absence of that company, the rights and obligations or debts, as against its stockholders, can be disposed of in the present action from the standpoint solely of the relations of the various stockholders one to another.

The plaintiffs, on the other hand, admit that any yet existing debt against the corporation, or any claim which can be made through the corporation or by a creditor, against its stockholders, may still be urged in a court of law, against the stock in their hands, if in the present action it be decreed that they are entitled to that stock or an accounting for the value thereof.

846

Under the defendant's theory it is urged that the lands of the Houston and Texas Central Railway Co. were not then marketable, and that the outstanding indebtedness, other than that secured by the mortgages, could not therefore be paid by that means. They thus ask to show that no surplus or equity was shown to exist, which would be available for general creditors, and that from this standpoint the foreclosure suit could not be held to be collusive or fraudulent.

The plaintiffs agree in this proposition and say that for this reason the rights given up by the general creditors were of no value, and that if the majority stockholders of the Railway Company, through the action of the Southern Pacific Co., could wipe out the unsecured debts, the Southern Pacific Co. should not be allowed to insist upon the validity of the foreclosure action, in so far as it cut off or destroyed the claims of those creditors against the property bought in by the Southern Pacific Co., and then to insist that these claims were not wiped out or cut off by reason of the fact that the Southern Pacific Co. obtained by purchase the property for itself.

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It must be held that the defendant has, for the purposes of the present action, obtained the property free from any lien or claims of the general creditors. The plaintiffs did not have an opportunity to prevent the action of the majority stockholders, in thus acquiring the property of the Railway Company, and that the Southern Pacific Co. acquired this property subject to any equitable rights which the minority stockholders might have therein. Such cases as *Ervin vs. Oregon Ry. and Nav. Co.*, 27 Fed., 625; *Farmers' Loan and Trust Co. vs. N. Y. and N. R. Co.*, 150 N. Y., 410; *Sparrow vs. Bement*, 142 Mich., 441; *Backus vs. Brooks*, 195 Fed., 452; *Cook on Corp.*, sec. 662, and cases cited; *Synnott vs. Cummings*, 116 Fed., 40, sufficiently establish the proposition that the minority stockholders had rights which they could enforce against the property in the hands of the majority stockholders. In enforcing these rights, they can insist upon an accounting and division of their property in equity, leaving the property, that is, the shares of stock in their hands, subject to any

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850 *Interlocutory Decree on Trial of Main Issue.*

claims which are still valid and enforceable against the stockholders, either through the Houston and Texas Central Railway Co. itself, or against the stockholders directly.

This is the relief asked in the present action and to which the plaintiffs would seem to be entitled. They may have a decree therefor.

Interlocutory Decree on Trial of Main Issue.

851

(Filed December 13, 1915.)

At a Term of the United States District Court, held in and for the Eastern District of New York, in the United States Court House, and Post Office Building, in the Borough of Brooklyn, City of New York, on the 13th day of December, 1915.

852

Present—Hon. THOMAS L. CHATFIELD, Dist. Judge.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

This cause came on to be heard at this Term, and was argued by counsel; and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED:

That the defendant, Southern Pacific Company, in the year 1889, secured and still has in its possession and under its control, one hundred thousand (100,000) shares of the par or face value of ten million (\$10,000,000) dollars, of the common stock of the Houston & Texas Central Railroad Company, a corporation organized and existing under the laws of the State of Texas. That the total outstanding capital stock of the Houston & Texas Central Railway Company was seventy-seven thousand, two hundred and sixty-nine (77,269) shares, and the said defendant, Southern Pacific Company, now has in its possession and holds (unless pledged subsequent to receipt), for the benefit of the complainants, and the other stockholders of the Houston & Texas Central Railway Company, respectively, who may come in and contribute to the expenses of this action, stock of the Houston & Texas Central Railroad Company, in the following proportions: For each seventy-seven thousand two hundred and sixty-nine hundred thousandth of a share (.77269) of the stock of the Houston & Texas Central Railway Company, held by the complainants, and by the other stockholders of the said Railway Company who may come in and contribute to the expenses of this action, respectively, the defendant, Southern Pacific Company has in its possession and holds (unless pledged subsequently), for said complainant and other stockholders, one share of the capital stock of the Houston & Texas Central Railroad Company. That the complainants, Henry L. Bogert, Townsend Lawrence and Anita Lawrence, as executors under the last will and testament of Walter B. Lawrence, deceased, own and hold 100 shares

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856 *Interlocutory Decree on Trial of Main Issue.*

of the capital stock of the Houston & Texas Central Railway Company. That the said defendant, Southern Pacific Company, holds and has in its possession one hundred and twenty-nine and two-fifth ($129\frac{2}{5}$) shares of the common stock of the Houston & Texas Central Railroad Company, for the benefit of and belonging to the said complainants, Henry L. Bogert, Townsend Lawrence and Anita Lawrence, as executors under the last will and testament of Walter B. Lawrence, deceased; and it is

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FURTHER ORDERED, ADJUDGED AND DECREED: That R. B. Whittemore, Henry Fitch and Russell H. Landale, as trustees of stockholders of the Houston & Texas Central Railway Company, at the time of the grievances alleged in the bill of complaint, and on whose behalf and for whose benefit this action was brought, be brought in and are hereby made parties complainant, in accordance with the stipulation of the complainants and defendant; and it is

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FURTHER ORDERED, ADJUDGED AND DECREED: That Joseph G. Cochran be and he hereby is appointed special master, to take testimony and report the number of shares of the capital stock of the Houston & Texas Central Railway Company, owned and possessed by the said R. B. Whittemore, Henry Fitch and Russell R. Landale, as trustees of stockholders of the Houston & Texas Central Railway Company, or otherwise, and the proportionate amount of common stock of the Houston & Texas Central Railroad Company, held and possessed by the Southern Pacific Company, for the benefit of the said R. B. Whittemore, Henry

Fitch and Russell H. Landale, as trustees as aforesaid, on the basis hereinbefore specified and decreed; and it is

FURTHER ORDERED, ADJUDGED AND DECREED: That the defendant, Southern Pacific Company, deliver to the complainants, Henry L. Bogert, Townsend Lawrence and Anita Lawrence, as executors, as aforesaid, one hundred and twenty-nine and two-fifth ($129\frac{2}{5}$) shares of the common stock of the Houston & Texas Central Railroad Company, and account for and pay over to them all dividends received by the Southern Pacific Company upon the said stock, with interest at the rate of six per cent. from the date of the receipt of said dividends, and thereupon the said complainants shall deliver and surrender to the defendant one hundred (100) shares of the common stock of the Houston & Texas Central Railway Company; and it is

FURTHER ORDERED, ADJUDGED AND DECREED: That the defendant, Southern Pacific Company, deliver to R. B. Whittemore, Henry Fitch and Russell H. Landale, as trustees, and to such other stockholders of the Houston & Texas Central Railway Company as may be brought in as parties complainant, the proportionate number of shares of the common stock of the Houston & Texas Central Railroad Company, which the said special master shall report are held and owned by the defendant, Southern Pacific Company, as herein provided and decreed, and that said defendant account for and pay over to them, respectively, any dividends received by the Southern Pacific Company upon the said stock, with interest at the rate

862 *Interlocutory Decree on Trial of Main Issue.*

of six per cent. per annum from the date of the receipt of said dividends, and that thereupon the said respective stockholders of the Houston & Texas Central Railway Company shall deliver and surrender to the defendant the number of shares of stock of the Houston & Texas Central Railway Company, possessed by them, as found and reported by the said special master; and it is

863 **FURTHER ORDERED, ADJUDGED AND DECREED:** That the said special master take testimony and report the amount of dividends and profits received by the defendant, Southern Pacific Company, upon the common stock of the Houston & Texas Central Railroad Company, to which, under this decree, the complainants and the said R. B. Whittemore, Henry Fitch and Russell H. Landale, as trustees, and the other stockholders who may be brought in as parties plaintiff, are entitled; and it is

864 **FURTHER ORDERED, ADJUDGED AND DECREED:** That the defendant, Southern Pacific Company, has expended under the agreement for the reorganization of the Houston & Texas Central Railway Company, no more than the sum of two million, six hundred and two thousand, six hundred and fifteen, and 77/100 (\$2,602,615.77) dollars, in acquiring and obtaining possession of said common stock of the Houston & Texas Central Railroad Company, and the sum of twenty-six dollars, two cents and six mills (\$26.026) is the proportionate or pro rata share of such expenditure to be borne by each share of the outstanding capital stock of the Houston & Texas Central Railroad Company, and to be paid in said proportion and

amount by the said complainants and by the said R. B. Whittemore, Henry Fitch and Russell H. Landale, as trustees, and by the other stockholders of the Houston & Texas Central Railway Company who may be brought in as parties plaintiff, which said sum, with interest to the date of payment, shall be paid to the defendant by the said complainants, and said R. B. Whittemore, Henry Fitch and Russell H. Landale, as trustees, and by such other stockholders as may be brought in as parties plaintiff, respectively, at the time of and contemporaneously with the delivery to them respectively by the defendant of the shares of stock of the Houston & Texas Central Railroad Company, and the payments of the dividends, with interest, herein ordered and directed to be delivered and paid by the defendant; and it is

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FURTHER ORDERED, ADJUDGED AND DECREED: That inasmuch as it has been suggested by the defendants that the Southern Pacific Company did, in the year 1911, pledge certificates of the capital stock of the Houston & Texas Central Railroad Company, held by it, including the stock which the said Southern Pacific Company, as hereinbefore adjudged, holds as trustee for the complainants and others similarly situated, said master is directed to inquire into all facts concerning the said pledge and report the same to the Court, to the end that the final decree herein may make directions with respect to proper rights of any pledgee or lienor; and it is

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FURTHER ORDERED, ADJUDGED AND DECREED: That the said special master proceed with said accounting before him, with all

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Interlocutory Decree on Trial of Main Issue.

convenient speed, at the place and places assigned to him, and that the defendant, by its proper officers, appear before said master, with its books, papers, records and documents, and submit to examination upon oath, touching upon all matters referred to said special master, and that the master proceed in making his report to this Court with all reasonable diligence; said reference to be brought on by any party to this action on ten days' notice to all parties, or their solicitors; and it is

869

FURTHER ORDERED, ADJUDGED AND DECREED: That the defendant, pay to the complainants, Henry L. Bogert, Townsend Lawrence and Anita Lawrence, as executors under the last will and testament of Walter B. Lawrence, deceased, their taxable costs and disbursements, to be taxed by the Clerk of this Court, on notice to the defendant; and it is

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FURTHER ORDERED, ADJUDGED AND DECREED: That any party may hereafter apply, upon notice to the other parties hereto, for such further order and direction as may be proper to carry out the purposes of this decree, and to be added at the foot hereof.

THOMAS I. CHATFIELD,
U. S. J.

Court's Memorandum on Settlement of Interlocutory Decree. 871

(Filed December 13, 1915.)

(1) Clause 6 of the stipulation shows that the floating debt holders were wiped out and were provided for if they wished to share in the reorganization. They, therefore, cannot claim the right to compel in equity a pro rata reimbursement unless they have preserved a right of action at law or in equity against the stock generally. This action goes only to the right to possession of the stock.

(2) Under the facts agreed upon in the record there is no need of a reference to fix the amounts as in the absence of clerical error they are already ascertained. 872

T. I. C.,
U. S. J.

Defendant's Exceptions to Interlocutory Decree.

(Filed December 30, 1915.)

DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK. 873

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

The defendant above named hereby files the following exceptions to the decree entered in this suit

874 *Defendant's Exceptions to Interlocutory Decree.*

bearing date the 13th day of December, 1915, in the following particulars:

FIRST.—The defendant excepts to that portion of the decree which provides:

875 "That the defendant, Southern Pacific Company, in the year 1889, secured and still has in its possession and under its control one hundred thousand (100,000) shares of the par or face value of ten million (\$10,000,000) dollars of the common stock of the Houston & Texas Central Railroad Company, a corporation organized and existing under the laws of the State of Texas."

SECOND.—The defendant excepts to that portion of the decree which provides:

876 "The said defendant, Southern Pacific Company, now has in its possession and holds (unless pledged subsequent to receipt) for the benefit of the complainants and the other stockholders of the Houston & Texas Central Railway Company, respectively, who may come in and contribute to the expenses of this action, stock of the Houston & Texas Central Railroad Company in the following proportions: For each seventy-seven thousand two hundred and sixty-nine hundred thousandth of a share (.77269) of the stock of the Houston & Texas Central Railway Company held by the complainants and by the other stockholders of the said Railway Company who may come in and contribute to the expenses of this action, respectively, the defendant, Southern Pacific

Company, has in its possession and holds (unless pledged subsequently) for said complainant and other stockholders, one share of the capital stock of the Houston & Texas Central Railroad Company."

THIRD.—The defendant excepts to that portion of the decree which provides:

"That the said defendant, Southern Pacific Company, holds and has in its possession one hundred and twenty-nine and two-fifths (129 $\frac{2}{5}$) shares of the common stock of the Houston & Texas Central Railroad Company for the benefit of and belonging to the said complainants, Henry L. Bogert, Townsend Lawrence and Anita Lawrence, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased."

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FOURTH.—The defendant excepts to that portion of the decree which provides:

"That Joseph G. Cochran be and he hereby is appointed Special Master to take testimony and report the number of shares of the capital stock of the Houston & Texas Central Railway Company owned and possessed by the said R. B. Whittemore, Henry Fitch and Russell H. Landale, as Trustees of stockholders of the Houston & Texas Central Railway Company, or otherwise, and the proportionate amount of common stock of the Houston & Texas Central Railroad Company held and possessed by the Southern Pacific Company for the benefit of the said R. B. Whittemore,

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880 Defendant's Exceptions to Interlocutory Decree.

Henry Fitch and Russell H. Landale, as Trustees, as aforesaid, on the basis hereinbefore specified and decreed."

FIFTH.—The defendant excepts to that portion of the decree which provides:

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"That the defendant, Southern Pacific Company, deliver to the complainants Henry L. Bogert, Townsend Lawrence and Anita Lawrence as Executors as aforesaid, one hundred and twenty-nine and two-fifth (129 2/5) shares of the common stock of the Houston & Texas Central Railroad Company and account for and pay over to them all dividends received by the Southern Pacific Company upon the said stock, with interest at the rate of six per cent. from the date of the receipt of said dividends, and thereupon the said complainants shall deliver and surrender to the defendant one hundred (100) shares of the common stock of the Houston & Texas Central Railway Company."

882

SIXTH.—The defendant excepts to that portion of the decree which provides:

"That the defendant, Southern Pacific Company, deliver to R. B. Whittemore, Henry Fitch and Russell H. Landale, as Trustees, and to such other stockholders of the Houston & Texas Central Railway Company as may be brought in as parties complainant, the proportionate number of shares of the common stock of the Houston & Texas Central Railroad Company, which the said special master

shall report are held and owned by the defendant, Southern Pacific Company, as herein provided and decreed, and that said defendant account for and pay over to them, respectively, any dividends received by the Southern Pacific Company upon the said stock, with interest at the rate of six per cent. per annum from the date of the receipt of said dividends, and that thereupon the said respective stockholders of the Houston & Texas Central Railway Company shall deliver and surrender to the defendant the number of shares of stock of the Houston & Texas Central Railway Company, possessed by them, as found and reported by the said special master."

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SEVENTH.—The defendant excepts to that portion of the decree which provides:

"That the said special master take testimony and report the amount of dividends and profits received by the defendant, Southern Pacific Company, upon the common stock of the Houston & Texas Central Railroad Com-

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pany, to which, under this decree, the complainants and the said R. B. Whittemore, Henry Fitch and Russell H. Landale, as trustees, and the other stockholders who may be brought in as parties plaintiff, are entitled."

EIGHTH.—The defendant excepts to that portion of the decree which provides:

"That the defendant, Southern Pacific Company, has expended under the agreement for the reorganization of the Houston & Texas

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Central Railway Company, no more than the sum of Two million, six hundred and two thousand, six hundred and fifteen, and 77/100 (\$2,602,615.77) Dollars, in acquiring and obtaining possession of said common stock of the Houston & Texas Central Railroad Company, and the sum of Twenty-six Dollars, two cents and six mills (\$26.026) is the proportionate or pro rata share of such expenditure to be borne by each share of the outstanding capital stock of the Houston & Texas Central Railroad Company, and to be paid in said proportion and amount by the said complainants and by the said R. B. Whittemore, Henry Fitch and Russell H. Landale, as trustees, and by the other stockholders of the Houston & Texas Central Railway Company who may be brought in as parties plaintiff, which said sum, with interest to the date of payment, shall be paid to the defendant by the said complainants, and said R. B. Whittemore, Henry Fitch and Russell H. Landale, as trustees, and by such other stockholders as may be brought in as parties plaintiff, respectively, at the time of and contemporaneously with the delivery to them respectively by the defendant of the shares of stock of the Houston & Texas Central Railroad Company, and the payments of the dividends, with interest, herein ordered and directed to be delivered and paid by the defendant."

NINTH.—The defendant excepts to that portion of the decree which provides:

"That inasmuch as it has been suggested by the defendants that the Southern Pacific Com-

pany did, in the year 1911, pledge certificates of the capital stock of the Houston & Texas Central Railroad Company, held by it, including the stock which the said Southern Pacific Company, as hereinbefore adjudged, holds as trustee for the complainants and others similarly situated, said master is directed to inquire into all facts concerning the said pledge and report the same to the Court, to the end that the final decree herein may make directions with respect to proper rights of any pledgee or lienor."

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TENTH.—The defendant excepts to that portion of the decree which provides:

"That the said special master proceed with said accounting before him, with all convenient speed, at the place and places assigned to him, and that the defendant, by its proper officers, appear before said master, with its books, papers, records and documents, and submit to examination upon oath, touching upon all matters referred to said special master, and that the master proceed in making his report to this Court with all reasonable diligence; said reference to be brought on by any party to this action on ten days' notice to all parties, or their solicitors."

891

ELEVENTH.—The defendant excepts to that portion of the decree which provides:

"That the defendant pay to the complainants, Henry L. Bogert, Townsend Lawrence and Anita Lawrence, as executors under the last will and testament of Walter B. Lawrence, deceased, their taxable costs and dis-

892 *Defendant's Exceptions to Interlocutory Decree.*

bursements, to be taxed by the Clerk of this Court, on notice to the defendant."

Dated, December 29, 1915.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant,
Office and P. O. Address,
54 Wall Street,
N. Y. City.

To

893 DITTENHOEFER, GERBER & JAMES, Esqs.,
Solicitors for Complainant,
96 Broadway,
N. Y. City.

Sirs:

PLEASE TAKE NOTICE that the annexed is a copy of the bill of exception to the decree entered in this suit bearing date the 13th day of December, 1915, this day filed in the office of the Clerk of the United States District Court, Eastern District of New York, in the Post Office Building, Borough of Brooklyn, City of New York.

894

Dated, New York, December 30, 1915.

Yours, &c.,

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant,
Office and P. O. Address,
54 Wall Street,
Manhattan, N. Y. City.

To

MESSRS. DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainants,
96 Broadway,
N. Y. City.

Reference Before Special Master. 895

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

896

Brooklyn, N. Y., January 20, 1916.

Before—JOSEPH G. COCHRAN, Esq., Special Master,
appointed under decree dated December 13,
1915.

APPEARANCES:

DAVID GERBER, Esq., and DUDLEY F. PHELPS, Esq.,
for Complainants.

ARTHUR H. VAN BRUNT, Esq., and LEWIS H. FREED-
MAN, Esq., for Defendant.

897

It is stipulated that the signing of testimony by
witnesses is waived.

RUSSELL H. LANDALE, called as a witness on
behalf of the complainants, having been duly
sworn, testified as follows:

Direct Examination by Mr. Gerber:

I am one of the trustees of stockholders of the
Houston & Texas Central Railway Company re-

ferred to in the decree of December 13, 1915. As such trustee I have in my possession certain certificates of stock of the Houston & Texas Central Railway Company which I hold as one of the trustees. I now produce them.

Mr. Gerber: We offer them in evidence, being certificates of stock of the Houston Texas Central Railway Company standing in the following names, with the numbers of shares opposite the respective names, and bearing the following certificate numbers:

899

Name	Shares	Number
C. MacArdell	50	10482
	5	10510
	90	10857
	90	10858
	90	10859
	90	10860
	90	10861
	90	10862
	14	10863
	50	10941
Theodore Wilson	50	10942
	50	10943
	50	10944
	50	10945
	50	10946
	50	10865
	50	10864
	50	10827
	50	10828
	50	10583
Dick Brothers & Lawrence	50	10584

900

Russell H. Landale—Direct Examination.

901

Name	Shares	Number	
Francis P. O'Reilly	50	10736	
	50	10737	
	50	10738	
	50	10739	
Francis P. O'Reilly, Trustee	50	10740	
	50	10741	
	50	10742	
	50	10743	
	50	10744	
	50	10745	
	50	10746	902
	50	10747	
	50	10748	
	50	10749	
	50	10750	
	50	10751	
	50	10752	
	50	10753	
	50	10754	
	50	10755	
	50	10756	
	50	10757	
	50	10758	903
	50	10759	
P. W. Gallaudet & Co.	100	2375	
	100	2548	
	100	2949	
	100	2422	
	100	2442	
	100	2437	
	100	2886	
	100	2663	
	100	2423	
	100	2765	
	100	2389	
	100	2547	
	100	2424	

904

Russell H. Landale—Direct Examination.

Name	Shares	Number
Charles Breeden	50	10890
	50	10889
	50	10888
	50	10887
Munoz & Espriella	100	2573
	200	10898
Turner, Manuel & Co.	50	10886
	50	10885
	50	10884
	50	10883
A. S. McClelland	50	10882
	50	10899
	90	10778
	90	10779
	90	10780
	90	10781
	90	10782
	90	10783
	90	10784
	90	10777
	90	10776
	90	10775
	90	10774
	90	10773
	90	10772
	90	10771
	90	10770
	90	10769
	90	10768
	90	10767
	90	10766
	90	10765
	90	10764
	90	10763
	90	10762
	90	10761
	90	10760

906

Russell H. Lundale—Direct Examination.

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Lathrop, Smith & Oliphant	50	10702
	50	10703
	50	10704
	50	10804
	50	10805
	50	10806
	50	10807
	50	10830
	50	10829
	50	10699
	50	10700
	50	10701
	50	10715
	50	10716
	50	10717
	50	10718
	50	10719
	50	10720
	50	10721
	50	10722
	50	10723
	50	10724
	50	10725
	50	10726
	50	10727
	50	10728
	50	10870
	50	10871
	50	10872
	50	10873
	50	10874
	50	10875
	50	10876
	50	10877
	50	10878
	50	10879

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910

Russell H. Landale—Direct Examination.

Name	Shares	Number
Siegfr. Gruner & Co.	50	10536
	50	10537
	600	10894
	1000	10893
Julius Runge	50	10930
	50	10929
Latham Alexander & Co.	100	2773
W. French	7	10463
	100	2842
	50	10624
	50	10623
A. J. O'Reilly	50	10867
	50	10866
J. Lopez Blanco	100	10897
Otto Arens	1000	10895
	200	10900
P. J. Goodhart & Co.	100	2804
Leonard Scott	100	2720
Louis C. Stratemyer	50	10808
	50	10809
R. H. Landale	50	10936
	50	10935
912 Russell H. Landale	50	10892
	50	10891
Mary Jane Gillett, Executrix	100	2904
Moriac & Bishop	50	10054
Stephen W. Carey	100	2788
	100	2710
	100	2759
	100	2845
	100	2922
	100	2970
	100	2976
	50	10514
	50	10594
	50	10595
	50	10683
	50	10682

Russell H. Landale—Direct Examination.

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Name	Shares	Number
Julius A. Kohn	50	10856
	50	10855
	50	10854
	50	10853
	50	10852
	50	10851
	50	10850
	50	10849
	50	10848
	50	10847
	50	10846
	50	10845
	50	10844
	50	10843
James Landale	50	10794
	50	10793
A. C. Lawrence	100	3024
	10	11490
John Taylor & Co.	10	11491
	10	11492
	10	11493
	10	11494
	10	11495
	10	11496
	10	11497
	10	11498
	10	11499
	10	11424
	10	11425
	10	11426
	10	11427
	10	11428
	10	11429

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Russell H. Landale—Direct Examination.

Name	Shares	Number
Van Schaick & Co.	100	2751
	100	2752
	100	2810
	100	2898
	100	2899
W. S. Sillocks	100	2688
Warren S. Sillocks	100	2926
	100	2928
	100	2927
	100	2877
	100	2876
917	100	2687
	50	10646
	50	10647
	50	10648
	50	10645
Charles S. Walker	100	3010
	100	3009
	100	3008
	100	3007
	100	3006
918	100	3005
	100	3015
	100	3014
	100	3013
	100	3025
	100	3026

In the agreement that is signed by certain of the stockholders of the Houston & Texas Central Railway Company with the Trustees, there were four certificates of fifty shares each standing in the name of Daniel P. Ingraham, Jr., the certificates being numbered respectively 10787, 10788, 10789 and 10790. As far as I know, from the records of the Committee, which I have examined,

these certificates of stock were deposited with the Committee at that time by D. P. Ingraham, Jr. Subsequently to that time D. P. Ingraham, Jr., withdrew from the Committee these certificates, with the consent of the Committee, for transfer, the transfer to be to F. P. Freeman & Company. The certificates have not been returned to the Committee and the Committee does not know where they are. When I refer to the Committee I refer to R. B. Wittemore, Henry Fitch and Russell H. Landale, who are referred to in the decree as Trustees of the stockholders of the Houston & Texas Central Railway Company.

Cross Examination by Mr. Freedman:

The certificates which stood in Mr. Ingraham's name are not listed on the list which has been produced here. It is not a fact that these certificates of stock were all endorsed in blank by the various stockholders. I don't think any of the certificates were in blank with the power of attorney on the back thereof filled out in the names of the trustees.

Re-direct Examination by Mr. Gerber:

When I speak of the possession of the certificates which have been introduced in evidence, I refer, of course, to the joint possession of the three trustees mentioned in the decree.

Re-cross Examination by Mr. Freedman:

I have checked over the list produced by me here with the original certificates of stock in the possession of the Committee. The list now correctly sets forth the number of shares of stock and the certificate numbers of the various certificates of stock, the originals of which I produced.

922 Andrew K. Vandeventer—Direct Examination.

ANDREW K. VANDEVENTER, called as a witness on behalf of the complainants, having been duly sworn, testified as follows:

Direct Examination by Mr. Gerber:

My position with the Southern Pacific Company is that of treasurer. I do not know where the stock transfer books of the Houston & Texas Central Railway Company are. I saw them last probably between 1886 and 1892. The transfer agent of the Southern Pacific Company had possession of those books. The transfer agent retired from the service of the Southern Pacific Company twelve or fifteen years ago. His name is George Watkins. He is not in the City of New York. He is in Oneonta, New York. The present transfer agent of the Houston & Texas Central Railroad Company is J. A. Simpson. I have never had possession, nor do not know of any one in the Southern Pacific Company who has had possession of certificates of stock to the order of D. P. Ingraham, Jr., Nos. 10,787 or 10,788 or 10,789 or 10,790. I cannot tell you where you can get the transfer books of the stock transfers of this railway company. I cannot tell you if you wish to make a transfer of stock to whom to apply to make such transfer. I have been treasurer of the Southern Pacific Company, I think, ten or twelve years. Prior to that my position with that company was that of assistant treasurer. I had been assistant for five or six years—till 1901—when I was appointed treasurer. Prior to that I was chief clerk of the offices; book-keeper. I don't know what dividends were declared by the Southern Pacific Company upon the stock of the Houston & Texas Central Railroad Company. I mean to say that as treasurer of the

Southern Pacific Company, I state under oath I don't know what dividends have been declared. I have no books in my possession to show. I had until the fire, perhaps, at 120 Broadway in 1912. I have never furnished Mr. Van Brunt with a statement of the dividends which were declared on the stock of the Houston & Texas Central Railroad Company. I don't think I gave him any information on that subject. I do not know. No; I have not. I state under oath that I don't know of any book, paper or document which would show the dividends declared upon the stock of the Houston & Texas Central Railroad Company. The annual reports of the Houston & Texas Central Railroad Company are made up by the auditor of the Houston & Texas Central Railroad Company and the Comptroller of the Southern Pacific Company. The auditor is T. P. Cunningham. He is in Houston, Texas. The Comptroller of the Southern Pacific Company is A. D. McDonald. He is in New York; 165 Broadway.

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Mr. Van Brunt admits that the following are the dividends declared and received by the Southern Pacific Company on the amount of capital stock outstanding in the Houston & Texas Central Railroad Company, with the rate of percentage, date of draft drawn for each dividend declared, and total amount of dividend:

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Date draft was drawn.	Amount of capital stock outstanding.	Dividend Declared	
		Rate.	Amount.
March 30, 1903	\$10,000,000	6%	\$600,000
June 30, 1911	10,000,000	20%	2,000,000
June 18, 1913	10,000,000	3%	300,000

Mr. Gerber: We offer in evidence indenture dated March 1, 1911, between Cen-

928 *Defendants Stipulations, Documentary Evidence
and Offers.*

tral Pacific Railway Company, Southern Pacific Company and United States Trust Company of New York as trustee.

It is consented that in place of the original indenture a copy shall be marked in evidence.

Received and marked Complainants' Exhibit No. 14 of this date.

Complainants rest.

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It is stipulated by and between counsel for the respective parties that the above entitled action was commenced by service of a summons on the 28th day of July, 1913.

It is further stipulated by and between counsel for the respective parties hereto that the average date of payment of the amount paid by the defendant under the reorganization was the 10th day of February, 1891.

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Mr. Freedman: The decree entered in this suit contains the following provision: "Further ordered, adjudged and decreed that, inasmuch as it has been suggested by the defendants that the Southern Pacific Company did in the year 1911 pledge certificates of capital stock"—

Mr. Gerber (interrupting): I object to counsel making a statement upon the record, unless it is just his statement or some address he wants to deliver; it is not evidence, and as to what the decree contains, the decree itself is the best evidence.

Mr. Freedman (continuing): "—of the Houston & Texas Central Railroad Company held by it, including the stock which the

said Southern Pacific Company, as hereinbefore adjudged, holds as trustee for the complainants and others similarly situated, said Master is directed to inquire into all the facts concerning the said pledge and report the same to the Court, to the end that the final decree herein may make directions with respect to proper rights of any pledgee or lienor." The defendant offers to prove the fair market value of the various shares of stock forming the subject matter of and now held under the agreement heretofore offered in evidence by the plaintiffs and marked Exhibit 14 of January 20, 1916, and for that purpose we offer in evidence the following papers: 932

Mr. Gerber: Objected to as incompetent, immaterial and irrelevant. The paper itself is no evidence of anything. Second, the substance of the evidence is immaterial, irrelevant and incompetent and not within anything referred to the Special Master under the interlocutory decree. It is entirely immaterial and irrelevant what the intrinsic value of the stock may be, as the complainants, under the decree, are entitled to and desire the stock itself. This inquiry, if opened, will be interminable, because it will require examination of witnesses going into in detail the physical value of all the property of a great railroad, covering hundreds of miles in a foreign state, and innumerable questions that must arise respecting value of stock of the Houston & Texas Central Railroad Company, which is 933

934 *Defendants Stipulations, Documentary Evidence
and Offers.*

not upon the market and has no fixed market value. This offer of testimony, if the evidence were admitted, even the competent evidence, would simply open the door to taking of testimony in this and other States, and would make this reference interminable. These complainants ask the Special Master or Court to pass upon this question before any evidence is placed upon the record.

935 Mr. Freedman: Do we understand that your objection goes to the competency of the proof upon the ground that the form in which it is now presented is not the best evidence?

Mr. Gerber: On that and all the other grounds stated in my objection.

Papers offered marked respectively Exhibits A, B, C, D, E, F and G, for Identification.

936 Mr. Freedman: We offer in evidence certified copies of the judgments entered against the Houston and Texas Central Railway Company on May 17, 1889, in favor of the Lackawanna Iron & Coal Company for \$555,914.25, with interest at the rate of 8% per annum; in favor of the Morgan's Louisiana & Texas Railway and Steamship Company for \$1,795,570.81, with interest at the rate of 8% per annum; and in favor of Southern Development Company for \$858,113.15, with interest at the rate of 8% per annum, the said three certified copies of judgments being Defendant's Exhibits G, H and I, on the trial of the main issue herein.

Mr. Gerber: That is objected to as not being within any of the matter referred under

the interlocutory decree to the Special Master, and that the evidence is incompetent, immaterial and irrelevant on this reference and hearing, and that these very questions respecting these very judgments were passed upon and considered by Judge Chatfield when the action was brought and when the interlocutory decree was framed and signed by him.

It has heretofore been STIPULATED in this action that the principal amount expended by the defendant under the agreement for the reorganization of the Houston Texas Central Railway Company was the sum of \$2,602,615.77. 938

Mr. Freedman: The defendant further offers to prove from the books, data, records and papers of the various railroad companies whose shares of stock have been pledged under the French Loan, which is evidenced by the Indenture dated March 1, 1911, and is Complainants' Exhibit No. 14 of January 20, 1916, in this suit, the items and data which appear upon the Exhibits A, B, C, D, E, F and G for Identification. Such records, data and documents, other than certain records and data of the defendant company, are not now within the State of New York or within the Eastern District of New York. 939

Mr. Gerber: There being no books, papers or data of any railroad that are submitted for the present before the Master, it is impossible to state or tell whether the offered testimony will be competent or has

940 *Defendants Stipulations, Documentary Evidence
and Offers.*

any relevancy or materiality. We object to the substance of the evidence, as well, as being entirely immaterial, irrelevant and incompetent under the terms of the interlocutory decree, and as not being within any of the matters referred to the Special Master under the said decree.

941 Mr. Freedman: Defendant further offers to prove upon the data set forth in Exhibits A to G, inclusive, marked for Identification, that upon any reappraisement as required by the French Loan Indenture, Complainants' Exhibit No. 14 of January 20, 1916, the appraised value of the pledged stock under said Indenture is materially less than the appraised value as set forth in said Indenture and exhibit, and that to withdraw any of the stocks forming the subject matter of the pledge would subject the defendant company in this suit to a great hardship and would be inequitable and unjust.

942 Mr. Gerber: That is objected to upon the same grounds as the objection which has been stated at length to the preceding offer.

Mr. Freedman: The defendant further offers to prove the fair market value of the shares of stock of the Houston & Texas Central Railroad Company, so that in the event that the Court, by its final decree, should adjudge that it would be inequitable to decree the actual transfer and delivery of shares of stock to the plaintiffs or the committee of stockholders as trustees, that it may finally fix and determine what payments in money, if any, should be made by the respective parties to this suit.

Mr. Gerber: That is objected to on the same grounds as the objections which have been stated more at length to the preceding offers; further, that all that evidence would not have the slightest materiality or relevancy in the framing of the final decree, because, if the Court should determine that the Southern Pacific Company cannot withdraw the stock found to belong to the complainants because of the Indenture, Complainants' Exhibit No. 14, and will not or cannot substitute other securities as permitted by the said Indenture, it will be permissible for the Court to decree that certificates of beneficial interest declaring the rights and interests of the holders of the certificates be so framed and drawn and directed to be issued by the defendant under the final decree as to render it safe for the defendant, without any risk or danger to it, and in such form as to completely protect the rights of the complainants. 944

Hearing adjourned by consent to May 9, 1916. 945

**946 Defendant's Notice of Motions to En-
large Scope of Reference.**

(Filed March 28, 1916.)

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

947

against

SOUTHERN PACIFIC COMPANY,
Defendant.

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PLEASE TAKE NOTICE, that upon the annexed affidavit of ARTHUR H BRUNT, sworn to the 24th day of March, 1916, and upon all the papers and proceedings in the above entitled action, we shall move this Court at a stated term thereof, to be held at the Court Rooms, in the Post Office Building, Borough of Brooklyn, City of New York, on the 29th day of March, 1916, at 2 o'clock in the afternoon of that day, or as soon thereafter as counsel may be heard for an order enlarging the scope of the matters heretofore referred to the Special Master by the Interlocutory Decree heretofore entered in this suit, so as to permit said Master to take evidence as to the value of the securities pledged under the so-called French Loan, and to authorize said Master to sit in the State of Texas for the purpose of taking said testimony, or that an additional Master be appointed to take such testimony within the State of Texas, or that open commission be issued to a Master or to some

Defendant's Notice of Motions to Enlarge Scope of Reference. 919

other suitable person in Houston, Texas, for the purpose of taking such testimony, and for such other enlargement of said Interlocutory judgment so as to bring within the scope of the reference to said Master or to such other Master as may be appointed, such other matters as to the Court may seem proper, and for such other and further relief in the premises as to the court may seem just and proper.

Dated New York March 24, 1916. -

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JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant,
Office and P. O. Address,
54 Wall Street,
Manhattan,
N. Y. City.

To

MESSRS. DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainants,
No. 96 Broadway,
N. Y. City.

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**952 Affidavit in Support of Defendant's
Motion to Enlarge Scope of Refer-
ence.**

(Filed March 28, 1916.)

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

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HENRY L. BOGERT et al.,
Plaintiffs,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

State of New York, }
County of New York, } ss:

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ARTHUR H. VAN BRUNT, being duly sworn, deposes and says, that he is a member of the firm of Joline, Larkin & Rathbone, attorneys for the defendant in the above entitled action.

This is an action by a minority stockholder of the Houston & Texas Central Railway Company, and the prayer is for an accounting from the Southern Pacific Company. It is now claimed that the purpose of this action is to hold Southern Pacific Company as majority stockholder on the theory that as such it obtained for itself an advantage and that the benefit thus derived is held by it for the benefit of the minority.

This Court has found in the interlocutory decree heretofore entered that the conditions under which the Southern Pacific Company acquired the new

stock were created, at least in part, by its control of the majority stock of the Railway Company, and that therefore the minority are entitled to share in the purchase upon equitable terms, and by such decree referred certain questions to the Master for determination.

Plaintiffs claim that they are entitled to delivery of their *pro rata* share of the stock of the Houston & Texas Central Railroad Company (hereinafter called the New Company) and insist that such delivery should be decreed.

The defendant claims on the other hand that the plaintiffs and their associates having elected for many years to pursue remedies in which it was attempted to repudiate the agreement under which the stock was obtained and to attack the foreclosure sale, and having advanced no theory ratifying the transactions by which the stock was obtained until the commencement of the present action in 1913, it was entitled to assume that there was no possible question of its right to hold the stock in question and to deal with the same as the absolute owner thereof. In reliance upon the position taken by the plaintiffs and their associates for so many years, it pledged such stock in 1911. Under the terms of such pledge the defendant if called upon to release the stock and obtain the possession thereof so as to be able to transfer or turn over any part of it to the plaintiffs and their associates, would be caused great pecuniary loss. Therefore under well settled rules it is submitted that a court of equity will not decree delivery of a specific article where the carrying out of such decree would cause irreparable or great pecuniary loss to the party ordered to make such delivery without any commensurate advantage to the other party,

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but should decree that the value of the article should be ascertained and payment in money ordered instead.

In support of defendant's position the following, among other things, are pointed out :

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The record shows that Walter S. Lawrence, the defendant's testator, was a member of the Stockholders' Protective Committee and it also shows that all the actions set up in the answer, except the Gernsheim suits, were brought by the plaintiffs in such actions (each of whom was a depositor with such Protective Committee) at the instance of such Committee and for its benefit. It also appears that the attorneys in the Gernsheim suits are the attorneys for the plaintiffs in the present action and that the Gernsheim suits had the Committee's approval and support.

The actions thus brought were as follows :

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1. *Carey vs. Houston & Texas Central Railway Company, Southern Pacific Company et al.* This was brought in 1889 in the United States Circuit Court for the Eastern District of Texas, for the purpose of setting aside the foreclosure decree, the sale thereunder, and the reorganization plan, on the ground that each and all thereof were in fraud of the stockholders, and in such action it was prayed that the property be returned to the Receiver;

2. *Gernsheim vs. Olcott.* This was brought in 1889 in the Supreme Court of New York to vacate the decree of foreclosure and sale and to enjoin the carrying out of the reorganization plan on the ground that the same was a fraud upon the stockholders;

3. *Gernsheim vs. Central Trust Company.*

This was brought in the Supreme Court of New York in 1891 after the second assessment had been made for the purpose of enjoining the delivery of certain of the securities under the reorganization plan on the ground that the reorganization was a fraud upon the stockholders;

4. *MacArdell vs. Olcott.* This was brought

in the Supreme Court of New York in 1891 for the purpose of impressing a trust upon the property covered by the various mortgages of the Houston & Texas Central Railway Company which had been foreclosed upon the ground of fraud in the reorganization;

5. *Lawrence vs. Southern Pacific Company.*

This was brought in the Supreme Court of New York, Nassau County, in 1908, and removed to this Court, for the purpose of obtaining an accounting from the Southern Pacific Company and a transfer of the land grants from Olcott.

It will be noted that each of the above actions was brought in hostility to the reorganization upon the ground among other things that the plaintiffs in each of said suits and the persons associated with them had been defrauded and constituted an attack thereon. In none of them was the position taken which plaintiffs have finally stated to be their attitude in the case at bar, to wit, that the entire transactions by which the Southern Pacific Company obtained the stock of the New Company are affirmed and ratified and that all of the acts and steps theretofore attacked and claimed to have been in fraud of their rights had in fact been taken for

their benefit by the defendant acting in the capacity of trustee and demand made for plaintiffs' share of such stock. The present action is the first brought by the plaintiffs or any of the depositors with the Protective Committee, in which there is a ratification of all that was done under the reorganization plan and an election to pursue the fruits of the transaction in the hands of the Southern Pacific Company.

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It was not until after the beginning of the present suit in 1913 and after nearly twenty-five years of litigation and subsequent to the making of the French loan in March, 1911, hereinafter mentioned, that the plaintiffs advanced any claim to delivery of the stock of the New Company held by the Southern Pacific Company since 1891. The Southern Pacific Company was therefore fully justified in treating the stock as its property and dealing with it as such and this Court, in granting relief, should bear in mind these circumstances.

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After the stock had been in the possession of the Southern Pacific Company for over twenty years, during which time no claim had been made by anyone to any right thereto, and no question had been raised as to the title of the Southern Pacific Company, it pledged the same, together with certain other securities, in March, 1911, under the so-called French loan. This instrument was made by the Central Pacific Railway Company to the United States Trust Company, as Trustee, on March 1, 1911, to secure an issue of bonds aggregating two hundred and fifty million francs and the performance of the covenants and conditions of the trust agreement were unconditionally guaranteed by the Southern Pacific Company. Copy of the loan agreement was placed in evidence before

the Master and marked "Complainants' Exhibit No. 14 of January 20, 1916."

In such loan agreement, among other things, the Southern Pacific Company covenanted that it would not sell or suffer to be sold any of the shares of stock pledged thereunder including the stock of the Houston & Texas Central Railroad Company, and it was further covenanted that it had good title to and a right to pledge the securities deposited under said agreement.

If the decision foreshadowed by the interlocutory decree is correct in law, then this covenant made after the Southern Pacific Company had the securities in question in its possession and in its name and under its control for twenty years without the shadow of a claim having been made thereto by anyone, is false. The Southern Pacific Company made this covenant relying on the position taken by the plaintiffs and their associates during all these years of litigation in no single one of which did they make any claim to the said stock.

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It will probably be urged that the French loan permits the withdrawal of stock pledged thereunder and therefore the Southern Pacific Company can procure the release of the stock desired for delivery in accordance with the terms of any decree that may be made hereunder.

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The provisions of the loan permit the withdrawal of all (but not less than all) of the stocks or bonds of any one issue and the substitution of other securities of no less appraised value than the last previously appraised value of the securities so to be withdrawn provided that the securities offered in substitution shall be (1) of a character approved by the appraisers; (2) equal in appraised

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value to the last appraised value of the withdrawn securities; (3) the new securities plus those remaining under the pledge shall be appraised at the time of such substitution equal one hundred and twenty per cent. of the bonds outstanding under the loan, and (4) the aggregate dividends actually paid during two years prior to the transaction on the new securities plus those remaining under the pledge shall equal at least one hundred and twenty per cent. and the interest payable on the outstanding bonds.

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It should be noted that the pledge under the loan in each case is of all shares except a small amount to qualify directors. Southern Pacific Terminal Co. has outstanding 20,000 shares of stock, of which 19,995 are pledged under this loan; Morgan's Louisiana & Texas R. R. & Steamship Co. has outstanding 150,000 shares of stock, 100,000 of which are pledged under this loan and 49,940 of the remaining shares are deposited with Union Trust Co. against Southern Pacific Stock and can only be reissued under conditions which are extremely unlikely to occur; Oregon & Colorado R.

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R. Co. has outstanding 120,000 shares of preferred stock, 199,910 of which are pledged under this loan. Houston & Texas Central R. R. Co. has outstanding 100,000 shares of stock, of which 99,983 are pledged under this loan.

It will be seen therefore that with the exception of the Southern Pacific stock the amount of the shares of each company deposited under the loan represents the entire issue.

Deponent is informed that one of the cardinal points insisted on by the French Banks in negotiating this loan was that the deposited stock should be all the outstanding stock of the com-

pany in order that there should be no divergent stock interests. Deponent is also informed that it was for the purpose of preserving this state of affairs that the consents not to sell any of the shares of the capital stock and the provision requiring the release of all the stock of any one issue were inserted.

For the purpose of showing that any new appraisal of not only the Houston & Texas Central Railroad Company stock but the other stocks pledged to secure the said loan would result in a very material diminution in the appraised value thereof, the defendant sought to introduce before the Master tabulations of the earnings of the various companies for some five years last past which tabulations had been compiled from data in the possession of the defendant, Southern Pacific Company, such tabulations being marked for identification Defendant's Exhibits A, B, C, D, E, F and G for identification. They also produced an expert upon the value of securities and offered to prove by him that from such data a proper estimate of the value of the securities could be arrived at and to show by him the fair market value thereof. Such evidence was objected to upon the ground that the tabulations were not the best evidence or obtained from primary sources and that the books of the various companies constituted the best evidence in respect to their earnings and other data necessary to establish the basis for any estimate of the value of the securities in question, and upon the further ground that the reference to the Master was not sufficiently broad to authorize him to take evidence of this description or to make any finding in regard to the value of the pledged securities.

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Deponent submits that this being a suit in equity and the Court having resolved a very doubtful point in favor of the plaintiffs, which conclusion was necessary to entitle them to any relief whatsoever, equity would require that full evidence as to the damage which would be sustained by the Southern Pacific Company were specific delivery of the stock of the New Company decreed should be received in order to enable the Court to make a fair and equitable decision in respect to the rights of the parties in interest. If the Court is of the opinion that the scope of the reference is not sufficiently broad to render the evidence now offered competent deponent submits that the terms of such reference should be amended so as to permit the receipt of the evidence in question.

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If, on the other hand, the Court is of the opinion that the evidence of value now offered should be received, the objection as to the competency of the evidence is probably good. Deponent is informed and believes that the original books and data of the various companies, a statement of whose earnings are sought to be introduced, are situated in Texas and are in active and daily use in the operation of said companies, and that the officers who can testify as to the correctness of the entries contained in such books are also resident in Texas and actually engaged in the performance of their various corporate duties. That even if it were possible to determine in advance the exact books and witnesses which would be needed to establish the matters sought to be proved in this action, any attempt to transmit the necessary books to this jurisdiction and to bring the various officers whose testimony would be required before the present Master, would render it impossible to

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properly operate the properties involved and would cause irreparable loss to the Southern Pacific Company which controls such properties.

WHEREFORE deponent prays (1) that if this Court considers it necessary the scope of the matters referred to the Master be enlarged to permit him to take evidence as to the value of the securities pledged under the so-called French loan; (2) that the Master be authorized to sit in the State of Texas or that an additional Master be appointed to take evidence within the State of Texas or that an open commission be issued either to a Master or some other suitable person in Houston, Texas, for the purpose of taking the evidence which it is desired to introduce in regard to the value of the securities in question and of transmitting the same to this Court; and (3) for such other enlargement of the order of reference or other relief as to the Court may seem proper.

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ARTHUR H. VAN BRUNT.

Sworn to before me this
24th day of March, 1916.

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WILLIAM D. TUCKER,
Notary Public,
New York County.

**982 Affidavit in Opposition to Defendant's
Motion to Enlarge Scope of Refer-
ence.**

(Filed April 11, 1916.)

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

983

HENRY L. BOGERT et al., Complainants, against SOUTHERN PACIFIC COMPANY, Defendant.	{
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State of New York,
City and County of New York, } ss. :

Dudley F. Phelps, being duly sworn, deposes and says :

That he is one of the attorneys for the plaintiffs herein.

981 This suit has been pending since 1913, and prior to its commencement, several actions were brought, growing out of and in connection with the reorganization of the Houston & Texas Central Railway Company. At no time did the defendant, Southern Pacific Company, offer or indicate any readiness to deliver to the plaintiffs or to any minority stockholder, represented by the protective committee of the minority stockholders, any stock of the Houston & Texas Central Railroad Company, or the value of said stock. That in the answer in this action, there has been no tender made, nor readiness shown to deliver stock or the value of the stock to the plaintiff, or to any minority stockholder. That now, after interlocutory decree, it is

sought to offer evidence of the value of the stock, not in furtherance of any issue raised in the answer, nor for the purpose of paying the ascertained value to the plaintiffs, and there is no indication or expectation of an offer by the defendants to pay to the plaintiffs the value of the stock to which the minority stockholders may be entitled; but, on the contrary, the defendant filed on the 30th day of December, 1915, exceptions to the decision of the Court, preparatory to and for the purpose of laying the foundation for an appeal to the Circuit Court of Appeals from the final decree, and as deponent is advised and believes, the defendant intends to appeal to the Circuit Court of Appeals from the final judgment.

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The time, therefore, that will be taken in entering upon an extensive examination as to the value of the stock would be entirely wasted. As deponent is informed and believes, an examination of that character will run into many months, and probably years, for this reason:

The defendant desires to show not only the value of stock of the Houston & Texas Central Railroad Company, but also the value of all the different securities covered by the fifty million dollar mortgage, known as the foreign loan mortgage of the Southern Pacific Company—the theory of the defendant being that all those securities have depreciated in value, and therefore, in order to withdraw any portion of the stock of the Houston & Texas Central Railroad Company from the lien of the foreign loan mortgage, the substituted securities must equal not only the value of the stock withdrawn, but also make good the depreciation in value of all the other securities. This would mean an examination into the value of all these

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securities, the effect of which would require investigation respecting each one of the securities and each of the railroads or companies issuing the same, because the said securities, except the Southern Pacific stock, have no recognized market value, and therefore the evidence must be directed to the complex inquiries of items going to establish the value of the stock and bonds of railroads, a terminal company and a steamship line, which are not upon the market for sale.

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That, to ascertain the value of the Houston & Texas Central Railroad Company stock alone will require investigation not only in Texas and New York, but probably other places, including Washington, because evidence will have to be taken respecting the earning capacity of the road; its physical value as a dead property; the value of the road as a going property.

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The various items in the Interstate Commerce Commission reports, respecting the Houston & Texas Central Railroad Company will have to be gone into, and the experts who made up these figures will have to be examined and explain them. The same is true of the Texas Railroad Commissioners; they and their assistants and experts will have to be examined in Texas; the Tax Commissioners of Texas will also have to be examined; the earning capacity of the road as an adjunct to the Southern Pacific System will have to be gone into by experts; the value of over 6,000 acres of land remaining unsold under the trust for the retirement of the bonds of the road will have to be proved by real estate experts from many different localities in Texas, as the land, deponent is informed, consists of everything from ordinary farm land to valuable city sites. Experts' testimony will have

to be taken regarding the items going to make up the surplus; the amounts written off for depreciation, etc., the charges made for betterments, etc., and an exhaustive examination of the books of the road in Texas with experts familiar with railroad bookkeeping.

This same course would have to be followed in respect to the other railroads and companies, whose securities are covered by the foreign loan mortgage, and which securities are alleged to have depreciated in value—none of which securities, as deponent is informed, except the Southern Pacific Company stock, are on the market, or have a known market value. And, after all this is done, and months, and probably years spent with an amount of outlay which will be very serious to the minority stockholders, nothing will be accomplished, excepting the entry of a final decree, from which an appeal is going to be taken, in any event, by the defendant.

992

That, in the final decree, provision can be made to protect the defendant against the physical withdrawal of the stock covered by the foreign loan mortgage, and at the same time protecting the plaintiffs as stockholders, and their rights as stockholders, pending the appeal to the Circuit Court of Appeals.

993

That, if the Circuit Court of Appeals should affirm the decree and should then conclude to direct or permit the defendants to pay the cash value of the stock in place of the delivery of the stock, or a certificate of interest, which will protect the complainants, the Circuit Court of Appeals would have power to direct that the value of the stock be ascertained, and then the investigation will serve some purpose, which it certainly will not at

994

the present time, unless the defendant consents to waive its right of appeal from the final decree, and undertakes to pay the value of the stock, as ascertained after proof is taken, and as may be fixed by this Court.

995

The procedure contemplated by defendant, deponent believes, is similar to a condemnation proceeding, in which the only question is one of value to be paid to the owner of property or stock, and if that should be permitted by the Circuit Court of Appeals on the affirmance of the decree, it will be at a time when conditions are such as to show the real value of this stock, rather than at the present time, when some of the railroads and railroad properties are affected by the European war, preceded by several years of business depression.

996

At all events, as deponent verily believes and asserts, nothing can possibly be served by taking the evidence which is now sought to be taken in the way of proof similar to a condemnation proceeding, to fix values, when the defendant does not intend to pay the value, but has declared its intention to appeal to the Circuit Court of Appeals from the decree establishing the plaintiff's rights in the reorganization of the said Houston & Texas Central Railway Company.

Deponent respectfully submits that this motion should be denied, and the interlocutory decree remain as entered without modification. Thereafter, if the Circuit Court of Appeals affirms the judgment, the record contains everything necessary for it to pass upon the question now presented, and said Court can modify the decree in any way it deems equitable and can send the case back for further evidence of the value of the stock, if it decides it would be more equitable to give plain-

tiffs the cash value rather than the stock or certificates of beneficial interest in it.

It is, therefore, most earnestly urged that the Circuit Court of Appeals should first pass upon the question of plaintiffs' rights to relief, upon the record as it now stands, and when it is finally determined by the Court of Appeals what those rights are, all necessary additional evidence can be taken.

In addition to the foregoing equitable reasons why this motion should be denied on the merits, the objection is also made by deponent that defendant is estopped by its answer from making the defense urged in the present motion.

998

Paragraph 27, pages 19 and 20 of the answer, alleges that the defendant admits "that certificates representing all of the ten million dollars par value of capital stock of the railroad company, excepting directors' qualifying shares, were delivered to and acquired by this defendant in the City and State of New York, and that this defendant now holds and owns and claims to own and hold the same; and the defendant alleges that the said acquisition and ownership of the said stock was and is, in all respects, lawful and proper."

999

Nowhere in the answer or in any other way is the present defense set up or suggested until after the entry of the interlocutory decree, and as presented by the present motion.

Under no rules of practice should the said defense be now entertained by the Court, after the entry of the decree.

DUDLEY F. PHELPS.

Sworn to before me this
8th day of April, 1916.

THOMAS F. GARRITY,
Notary Public,
New York County.

**1000 Order Denying Defendant's Motion
to Enlarge Scope of Reference.**

(Filed May 1, 1916.)

At a Stated Term of the United States District Court, held in and for the Eastern District of New York, at the United States Court House and Post Office Building, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 1st day of May, 1916.

1001

Present—Hon. THOMAS I. CHATFIELD, District Judge.

HENRY L. BOGERT et al.,
Complainants.

against

SOUTHERN PACIFIC COMPANY,
Defendant.

1002

The defendant having made a motion for an order enlarging the scope of the matters heretofore referred to the Special Master by the interlocutory decree heretofore entered in this suit, so as to permit said master to take evidence as to the value of the securities pledged under the so-called French Loan, and to authorize the master to sit in the State of Texas, for the purpose of taking said testimony, or that an additional master be appointed to take such testimony within the State of Texas, or that an open commission issue to a master or to some other suitable person in Houston, Texas,

*Order Denying Defendant's Motion to Enlarge
Scope of Reference.* 1003

for the purpose of taking such testimony, and for such other enlargement of said interlocutory judgment, so as to bring within the scope of the reference to said master or to such other master as may be appointed, such other matters as to the Court may seem proper, and for such other and further relief in the premises as to the Court might seem just and proper, and the said motion having duly come on to be heard,

NOW, on reading the notice of motion, dated 1004
the 24th day of March, 1916; the affidavit of Arthur H. Van Brunt, sworn to the 24th day of March, 1916; the affidavit of Dudley F. Phelps, sworn to the 8th day of April, 1916; and upon all the pleadings and proceedings herein, and after hearing Arthur H. Van Brunt, of counsel for defendant, in support of said motion, and H. Snowden Marshall, of counsel for plaintiffs, in opposition thereto,

NOW, on motion of Dittenhoefer, Gerber & James, attorneys for the plaintiffs, it is 1005

ORDERED, that the said motion be and the same hereby is, in all respects, denied.

THOMAS I. CHATFIELD,
U. S. D. J.

**1006 Reference Before Special Master—
Continued.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

Brooklyn, N. Y., May 9, 1916.

Before JOSEPH G. COCHRAN, Esq., Special Master.

Hearing resumed pursuant to adjournment of
Jan. 20, 1916.

Same appearances.

1008

ALEXANDER J. HEMPHILL, called as a witness on behalf of the defendant, having been duly sworn, testifies as follows:

Direct Examination by Mr. Freedman:

My occupation is that of Chairman of the Guaranty Trust Company of New York. By Chairman I mean Chairman of the Board of Directors. I have filled that position about sixteen or seventeen months; I was President prior to that. Prior to filling the position of Chairman of the Board of

Directors, I was President of the Guaranty Trust Company from 1909 up to 1915—about five or six years. Prior to being President, I was Vice-President since 1905. Prior to my connection with the Guaranty Trust Company, all my business experience has been in connection with railroads of the United States. As to what experience that was, I began in 1875, and then about 1880 I became Secretary to the Financial Vice-President of the Pennsylvania Railroad Company; in 1883 I became an officer of the Norfolk and Western Railway Company, and continued there until I changed to the banking business.

1010

Q. Have you had occasion, as President, or in your other capacities with the Guaranty Trust Company, to examine into the value of securities of railroad companies of the United States?

Mr. Gerber: That is objected to as immaterial, irrelevant and incompetent, and not within any matter referred to the Special Master under the interlocutory decree, and further upon the ground that this very question as to the inadmissibility of evidence of this character was brought before the Court on motion made by the defendant for leave to permit the Master to take evidence as to the securities pledged under the so-called French Loan, and that after argument, Judge Chatfield denied the motion and an order was entered to that effect on May 1, 1916.

1011

Objection overruled. Plaintiff excepts.

NOTE.—The papers on the motion, and also the order, referred to in the foregoing objection are printed at pages 316 to 335 of the record.)

A. Very frequently.

1012

Alexander J. Hemphill—Direct Examination.

In connection with my duties as an officer of the Guaranty Trust Company I have very frequently passed upon the value of stocks of corporations generally. I have very frequently been consulted in connection with the purchase and sale of stocks in our corporation.

Q. You had occasion to familiarize yourself with the methods generally employed in determining the value of stocks of various corporations?

1013

Mr. Gerber: Objected to upon the grounds stated in my preceding objection.

Objection overruled.

A. I had.

Q. Will you please state the experience that you have had in connection with familiarizing yourself as to the method determining the value of stock?

Objected to upon the grounds stated in my preceding objection.

Objection overruled.

1014

A. I have had many cases where it has been necessary to analyze all the figures of any reports, etc., and look up the value of securities issued by the various companies in making their reports.

Q. Have you had experience in connection with your duties as an officer of the Guaranty Trust Company in passing on loans made by that institution in connection with stocks of corporations, which were offered as collateral?

Objected to.

Objection overruled.

A. Daily experience for years.

Q. In connection with passing on the loans, were you called upon to determine the fair market value of the stocks which were offered as collateral?

Objected to.

Objection overruled.

A. Yes.

As to whether there was any particular kind of data or information which is asked to be furnished in order to determine the fair market value of stocks of corporations, we always insist upon having the gross income; we also look into the expense of operation, and we see what the operating income is, and we have to deduct the charges, taxes, rentals and fixed charges, and arrive at the net income, and the net income predicated, we fix the market value of the stock. In considering that data, or net income, we always try to take an average running over a series of years.

1016

Q. Would, in your opinion, a period of five years be an average length of time sufficient to predicate the value of stocks?

1017

Mr. Gerber: Objected to.

Mr. Freedman: I will ask Mr. Gerber whether or not he now has any objection to the qualifications of this witness?

Mr. Gerber: I decline to answer that question, and state that when the defendant's attorney finishes his examination I will answer if I deem it advisable.

Q. Mr. Hemphill, I will ask you to assume that a railroad company has \$10,000,000.00 of common stock, all of this stock being outstanding, that the operating income of that railroad company begin-

1018 *Alexander J. Hemphill—Direct Examination.*

ning with the year 1907, and for the year 1907 and the subsequent years, including the year 1915, was as follows, namely :

	For the year 1907.....	\$2,093,518.21
	" " " 1908.....	1,135,667.40
	" " " 1909.....	1,285,132.61
	" " " 1910.....	1,302,705.46
	" " " 1911.....	1,369,577.44
	" " " 1912.....	660,333.57
1019	" " " 1913.....	1,102,820.73
	" " " 1914.....	667,747.93
	" " " 1915.....	1,053,272.25

and that the net income (or loss) of such railroad company

	for the year 1907 was a net income of	\$1,332,673.04
	" " " 1908 " " " " "	347,899.94
	" " " 1909 " " " " "	555,310.75
	" " " 1910 " " " " "	651,728.33
	" " " 1911 " " " " "	711,384.99
	" " " 1912 the net loss was	191,821.41
1020	" " " 1913 " " income was	23,073.66
	" " " 1914 " " loss was	435,203.80
	" " " 1915 " " income was	169,493.27

I ask you whether, assuming such facts, you are able to state what the fair market value was of the stock of such railroad company at the end of the fiscal year 1915?

Mr. Gerber: Objected to as immaterial, irrelevant and incompetent; further, it is not within any matter referred to the Special Master under the interlocutory decree; that at a previous hearing objection was raised

to an offer of such evidence, whereupon a motion was made by the defendant to Judge Chatfield to change his interlocutory decree; that motion was founded upon an affidavit of Mr. Van Brunt, stating, among other things, as follows:

"For the purpose of showing that any new appraisal of not only the Houston and Texas Central Railroad Company stock, but the other stocks pledged to secure the said loan would result in a very material diminution in the appraised value thereof, the defendant sought to introduce before the Master tabulations of the earnings of the various companies for some five years last past, which tabulations had been compiled from data in the possession of the defendant, Southern Pacific Company. * * * They also produced an expert [referring to the present witness] upon the value of securities, and offered to prove by him that from such data a proper estimate of the value of the securities could be arrived at, and to show by him the fair market value thereof. Such evidence was objected to upon the ground * * * [among others] that the reference to the Master was not sufficiently broad to authorize him to take evidence of this description, or to make any finding in regard to the value of the pledged securities."

1022

1023

Based on that affidavit, a motion was made for an order enlarging the scope of the matters heretofore referred to the Special Master by the interlocutory decree heretofore entered in this suit, so as to permit

said Master to take evidence as to the value of the securities pledged under the so-called French Loan; that motion was argued at length before Judge Chatfield, and the order which recites the nature of the motion states that the "Defendant having made a motion for an order enlarging the scope of the matters heretofore referred to the Special Master by the interlocutory decree heretofore entered in this suit, so as to permit said Master to take evidence as to the value of the securities pledged under the so-called French Loan"; that motion was denied and an order entered May 1, 1916.

This question, therefore, has been passed upon by Judge Chatfield, and this evidence is full in the teeth of the ruling of Judge Chatfield.

(NOTE—The papers on the motion, and also the order, referred to in the foregoing objections are the same papers and order previously referred to at page 337 of this record and are printed at pages 316 to 335 of this record.)

Mr. Van Brunt: Upon the oral argument, and upon the Judge rendering his decision, no such claim was made. The ruling of the Judge is to the effect that he denied the motion to enlarge the matters referred to the Master, but it nowhere appears in that ruling, or in the order, that the matter now offered is not absolutely within the scope of that reference as made by the interlocutory decree.

Mr. Gerber: If it had been within the scope of that interlocutory decree, there

would have been no occasion for the motion.

Mr. Van Brunt: Defendant's counsel replies that this is Mr. Gerber's conclusion as to the ground for the motion which is founded on an improper hypothesis.

Mr. Gerber: In stating my objection I read from the affidavit of Mr. Van Brunt, I read from his notice of motion founded on his affidavit, and I read from the copy of the order which was entered.

Mr. Freedman: We raise the objection that the Master under the interlocutory decree has no right to rule on the question as to the admissibility on the findings or any testimony offered. 1028

Objection sustained. Defendant excepts.

Q. Mr. Hemphill, assuming that a railway company has shares of stock, all of which is common stock, of the par value of \$27,084,372.00 outstanding, that the railway operating income of such railway company

for the year 1907 is	\$2,510,092.97	1029
" " " 1908 it was	1,650,869.67	
" " " 1909 " "	2,539,398.19	
" " " 1910 " "	2,659,113.49	
" " " 1911 " "	2,783,999.87	
" " " 1912 " "	1,796,747.66	
" " " 1913 " "	2,080,269.05	
" " " 1914 " "	1,496,485.11	
" " " 1915 " "	1,453,907.41	

that the net income (or loss) of said railroad company

1030

Alexander J. Hemphill—Direct Examination.

for the year 1907	net loss was	\$ 550,230.67
" " " 1908	" " "	716,236.28
" " " 1909	" income "	472,045.44
" " " 1910	" " "	708,499.94
" " " 1911	" " "	662,281.35
" " " 1912	" loss "	561,155.05
" " " 1913	" " "	706,893.45
" " " 1914	" " "	1,186,603.62
" " " 1915	" " "	1,524,831.42

1031

are you able to state from such data and from making such estimation what the fair market value of the stock of such railroad company was at the close of the fiscal year 1915?

Objected to on the same grounds as the preceding question.

Objection sustained. Defendant excepts.

Q. What, in your opinion, was the fair market value of the stock of such railroad company at the close of the fiscal year 1915?

Objected to on the same grounds as the preceding question.

1032

Objection sustained. Defendant excepts.

Q. Assume that a railroad company with a total authorized capital stock of \$15,000,000, all of which was common stock and all of which was issued and outstanding had a railway operating income.

for the year 1907 of	\$1,158,499.20
" " " 1908 "	997,156.33
" " " 1909 "	1,229,039.06
" " " 1910 "	1,382,062.31
" " " 1911 "	1,344,116.08
" " " 1912 "	962,899.75
" " " 1913 "	495,719.65
" " " 1914 "	800,889.51
" " " 1915 "	708,858.12

and that said railroad company had a net income (or loss)

for the year	1907	net loss	of	\$747,040.90
" "	" 1908	" income	"	683,267.37
" "	" 1909	" "	"	756,192.23
" "	" 1910	" "	"	879,641.80
" "	" 1911	" "	"	768,661.93
" "	" 1912	" "	"	254,135.57
" "	" 1913	" loss	"	106,211.72
" "	" 1914	" income	"	176,421.28
" "	" 1915	" "	"	122,802.59

can you from such data, and assuming such facts, state what in your opinion was the fair market value of a share of stock of such railroad company at the close of the fiscal year of such company, year 1915?

Objected to upon the same grounds as the objection to the preceding question. .

Objection sustained. Defendant excepts.

Q. Will you state what in your opinion was the fair market value of a share of stock of such a railroad company at the close of its fiscal year for the year 1915?

Objected to upon the same grounds as the objection to the preceding question.

Objection sustained. Defendant excepts.

Q. Assume that a railroad company has a total authorized capital stock of \$19,000,000, of which \$12,000,000 is preferred and \$7,000,000 common, all of which stock is outstanding, and that said railroad company for the year 1907 had an income of \$1,539,811.06,

1036 Alexander J. Hemphill—Direct Examination.

for the year 1908	an income of	\$2,527,100.25
" " " 1909	" " "	2,976,393.67
" " " 1910	" " "	3,771,587.24
" " " 1911	" " "	3,715,533.68
" " " 1912	" " "	2,927,624.56
" " " 1913	" " "	3,103,927.35
" " " 1914	" " "	2,307,396.63
" " " 1915	" " "	1,190,729.17

and that said railroad company had a net income (or loss.)

1037

for the year 1907	net income of	\$ 317,266.36
" " " 1908	" " "	949,813.76
" " " 1909	" " "	1,264,383.22
" " " 1910	" " "	2,043,593.61
" " " 1911	" " "	2,015,340.28
" " " 1912	" " "	1,230,908.34
" " " 1913	" " "	1,376,453.49
" " " 1914	" " "	555,077.35
" " " 1915	loss "	27,661.19

1038

from such data and assuming such facts, are you able to state what was the fair market value of a share of stock of such railroad company at the close of its fiscal year for the year 1915?

Objected to upon the same grounds as the objection stated at length to the preceding question.

Objection sustained. Defendant excepts.

Q. Will you kindly state what in your opinion was the fair market value of a share of stock of such railroad company at the close of its fiscal year for the year 1915?

Objected to upon the same grounds as the objection to the preceding question.

Objection sustained. Defendant excepts.

Q. Assume that a railroad company with a total authorized capital stock of \$2,000,000, all of which is common stock and all of which is issued and outstanding, has a railroad operating income for the

for the year 1907 of	\$217,349.10	
“ “ “ 1908 “	157,835.48	1040
“ “ “ 1909 “	154,016.02	
“ “ “ 1910 “	147,571.60	
“ “ “ 1911 “	113,921.24	
“ “ “ 1912 “	120,511.84	
“ “ “ 1913 “	237,691.60	
“ “ “ 1914 “	184,681.51	
“ “ “ 1915 “	152,070.34	

and that such railroad company had a net income (or loss)

for the year 1907 net loss of	\$ 8,448.39	1041
“ “ “ 1908 “ income “	164,017.67	
“ “ “ 1909 “ “ “	151,334.70	
“ “ “ 1910 “ “ “	150,383.37	
“ “ “ 1911 “ “ “	118,678.54	
“ “ “ 1912 “ “ “	125,480.80	
“ “ “ 1913 “ “ “	238,824.03	
“ “ “ 1914 “ “ “	178,769.46	
“ “ “ 1915 “ “ “	205,058.84	

upon such data and assuming such facts, are you able to state what the fair market value of a share of stock of such railroad company was at the close of its fiscal year for the year 1915?

Defendants Offers.

1042

Objected to upon the same grounds as the objection to the preceding question.

Objection sustained. Defendant excepts.

Q. Will you state what is the fair market value of a share of stock of such railroad company at the close of its fiscal year 1915?

Objected to upon the same grounds as the objection stated at length to the preceding question.

1043

Objection sustained.

Defendant excepts.

Mr. Freedman: I offer to show that if the witness were permitted to answer the hypothetical question number one he could and would from those figures state that the fair market value of the stock of such a railroad company was from \$25 to \$30 a share.

1044

That in answer to hypothetical question number three, if the witness is permitted to answer, he could and would state that the fair market value of a share of stock of such a railroad company was \$30 a share.

That if the witness were permitted to answer the fourth hypothetical question he would and could state that the fair market value of the preferred stock of such a railroad company was \$40 a share.

And that if the witness were permitted to answer the fifth hypothetical question he could and would state that the fair market value of a share of stock of such a railroad company was \$100 a share.

Mr. Gerber: I object to that offer on the same grounds stated in our objections to the preceding questions, which objections were sustained, and the answers excluded. We object to their putting a question upon the record, and assuming the answer to a question which has been excluded as improper, as simply a method of spreading upon the record alleged testimony which they say they could establish, after the Special Master had ruled out the question and refused to permit the witness to answer. We ask that the offer be stricken from the record, as no proper part of the record. 1046

Mr. Phelps: The plaintiff has objected to the offer to prove by defendant's counsel, spread upon the record, over our objection, and we have, in connection with our objection, asked that the offer be stricken from the record as being improper and for the reasons stated at the time the offer was made. If that offer is to remain upon the record, it is only fair to the plaintiff to also state that counsel is advised by witnesses with whom he has conferred, that the defendant's offer to prove could not be made good, and that the proof on the part of the plaintiff would be that the stock referred to in hypothetical question No. 1 has an intrinsic value largely in excess of that stated by Mr. Freedman. And in respect of the other hypothetical questions, counsel for plaintiff has not made sufficient inquiry and examination to be justified in making any precise statement of value upon the record, excepting that the amounts stated 1047

1048 Russell H. Landale, Recalled—Direct Examination.

in the offer to prove spread upon the record by Mr. Freedman, are not in accord with information furnished counsel of the true value of stock of the corporations referred to in the hypothetical questions.

1049 Mr. Van Brunt: I object to the statement on the ground that no witness has been sworn or qualified who has been asked to testify to the matters mentioned in said statement and that it is immaterial and irrelevant, and move to strike it from the record.

Defendant rests.

Hearing closed, but subsequently reopened by consent and resumed on June 30, 1916.

RUSSELL H. LANDALE recalled by complainants:

By Mr. Gerber:

1050 I heretofore in this cause gave some testimony respecting certain stock of the Houston & Texas Central Railway Co. which I said had been deposited with the Committee by D. P. Ingraham, Jr. Regarding the certificate of stock of the Houston & Texas Central Railway Co. No. 10,788 for 50 shares, and another certificate No. 10,790 for 50 shares, and a third certificate of stock of the Houston & Texas Central Railway Co. for 50 shares, certificate No. 10,787, and a fourth certificate of the same company for 50 shares, No. 10,789, all purporting to be to the order of D. P. Ingraham, Jr., endorsed by D. P. Ingraham, Jr., and assigned to C. E. Baggott, with a detached power of attorney

of C. E. Baggott to blank, attached to the certificates of stock, I have this to say as to when I came across the certificates of stock, and in explanation of my former testimony in regard to the stock of D. P. Ingraham, Jr.: I discovered this stock that I have mentioned day before yesterday at the office of Mr. Scott McLanahan, attorney, 135 Broadway. I have, for some time past, been endeavoring to locate the stock of J. A. Cranitch, which it was claimed had been deposited with the Committee of minority stockholders and which I had been unable to find in a safe deposit box with the rest of the stock, which has been produced in evidence in this case. I ascertained that Mr. R. B. Whittemore, formerly a member of the stockholders' Committee, had died recently, and that his affairs were being looked after by his partners, Jewett Bros., New York City. I called with Mr. Fitch, my co-Committeeman, on Mr. Jewett; explained the purpose of my mission, and was told by Mr. Jewett that a bundle of papers, including stock certificates, had been delivered by Mr. Jewett to the attorney for the Whittemore estate, Mr. Scott McLanahan. Mr. Jewett explained that he had found these papers among Mr. Whittemore's effects, and upon consulting Mr. McLanahan, had delivered same to Mr. McLanahan. We called upon Mr. McLanahan. He was attorney for the Whittemore estate, I understand. Mr. McLanahan delivered to Mr. Fitch and myself not only the Cranitch stock, but these 200 shares of stock in the name of D. P. Ingraham, Jr., together with certain other stock certificates of the Houston & Texas Central Railway Co. D. P. Ingraham, Jr., was one of the subscribers of the protective committee, concerning which I testified on my former examination, to the extent of 200 shares. I am

1054 *Russell H. Landale, Recalled—Direct Examination.*

refreshing my recollection from one of the books of record kept by the committee of minority stockholders of the Houston & Texas Central Railway Co. That book shows the numbers of the certificates that were deposited. The numbers are 10,787 to 10,790, 50 shares each. Further along it has the words, "in transfer."

1055

Mr. Gerber: I offer in evidence the certificates to the order of D. P. Ingraham, Jr., each for 50 shares of the Houston & Texas Central Railway Co., being four certificates, numbered respectively 10,787, 10,788, 10,789 and 10,790.

By consent of counsel the original certificates need not be marked on their face, there being sufficient identification in the offer of the certificates, as stated by counsel in their introduction in evidence.

1056

Mr. Van Brunt: I object to the receipt of the certificates in evidence on the ground that they are incompetent, irrelevant and immaterial, that there is no proof that any of them have been deposited with, or produced by, and were continuously in the possession of the stockholders' committee.

At that time, as I have said, certain other certificates were handed to me as coming from the possession of the Whittemore estate. Mr. Whittemore was one of the members of the protective committee. He died April 8, 1916. I have testified, that at the time when my attention was directed to the certificates of stock of D. P. Ingraham, Jr., certain other certificates were handed to me. These certificates now shown me, to wit, three certificates to the order of J. A. Cranitch, totaling 200 shares,

one to Anderson Fowler, totaling 100 shares, and two to R. H. Landale, totaling 100 shares, are the certificates that were given to me at the same time that the others were. They came from the same source. Mr. Cranitch had deposited with the stockholders' committee 200 shares of stock. The three certificates, totaling 200 shares of stock, now shown me are the certificates that were handed to me as coming from the Whittemore estate.

Mr. Gerber: I offer in evidence certificate for 100 shares to Jeremiah A. Cranitch, No. 2,855; certificate for 50 shares to the order of Jeremiah A. Cranitch, No. 10,705; certificate for 50 shares to the order of Jeremiah A. Cranitch, No. 10,706; all of the Houston & Texas Central Railway Co. 1058

By consent of counsel the original certificates need not be marked on their face, there being sufficient identification in the offer of the certificates, as stated by counsel in their introduction in evidence.

Mr. Van Brunt: I object to the receipt of the certificates in evidence on the ground that they are incompetent, irrelevant and immaterial; that there is no proof that any of them have been deposited with or produced by and were continuously in the possession of the stockholders' committee; and the added objection that I particularly call attention to the fact that the scope of the reference is to take proof of the number of shares of the capital stock of the Houston & Texas Central Railway Co. owned and possessed by R. B. Whittemore, Henry Fitch and Russell H. Landale as trustees, and submit that 1059

1060 *Russell H. Landale, Recalled—Direct Examination.*

the proof is insufficient to show that the certificates in question were either owned or possessed by such trustees.

Whittemore was one of the three trustees of the protective committee. He had as such committee-man, possession of certificates of stock deposited with the committee. The books of the committee show that Mr. J. A. Cranitch deposited 200 shares of stock of the Houston & Texas Central Railway Company with the committee.

1061

Regarding the two certificates now shown me, both to the order of R. H. Landale, one for fifty shares of the Houston & Texas Central Railway Co., certificate No. 10,938, and the other for fifty shares of the same company, certificate No. 10,937, I have this explanation to make as to why those certificates were not introduced in evidence before, at the time I testified regarding the certificates of stock in my former testimony: Any transactions in regard to these certificates took place about twenty-two years ago. I have only the very dimmest recollection as to what took place and must have taken place. Mr. Whittemore and Mr. Fitch at that time desired to dispose of some of the stock of the Houston & Texas Central Railway Co. deposited with them, for the purpose of raising necessary funds for the conduct of the litigation. To the best of my belief, 100 shares of my stock were used for that purpose, or was to have been used for that purpose, and was withdrawn from the safety deposit box of the committee for that purpose. I had deposited these two certificates with the committee at the time the various certificates were deposited. I have before me the original book, showing the list of stockholders who had

1062

made deposits with the protective committee. The entry reads: "R. H. Landale, 200 shares, in the name of R. H. Landale, certificate Nos. 10,935 to 10,938, 50 shares each," following that is, "10,937, 10,938 in transfer." Included in the certificates deposited by me with the committee, were the two certificates to which my attention has been called, numbered respectively 10,937 and 10,938?

Mr. Gerber: I offer in evidence two certificates, numbered respectively 10,937 and 10,938, to the order of R. H. Landale, each for 50 shares of the Houston & Texas Central Railway Co. 1064

By consent of counsel the original certificates need not be marked on their face, there being sufficient identification in the offer of the certificates, as stated by counsel in their introduction in evidence.

Mr. Van Brunt: I object to the receipt of the certificates in evidence on the ground that they are incompetent, irrelevant and immaterial, that there is no proof that any of them have been deposited with or produced by, and were continuously in the possession of the stockholders' committee; and the added objection that I particularly call attention to the fact that the scope of the reference is to take proof of the number of shares of the capital stock of the Houston & Texas Central Railway Co. owned and possessed by R. B. Whittemore, Henry Fitch and Russell H. Landale as trustees, and submit that the proof is insufficient to show that the certificates in question were either owned or possessed by such trustees. 1065

1066 Russell H. Landale, Recalled—Direct Examination.

1067 Another certificate now shown me for 100 shares of the Houston & Texas Central Railway Co., No. 3021, to the order of Anderson Fowler, is one of the certificates that was handed to me in the manner I have already testified. Anderson Fowler was one of the stockholders who had deposited stock with the protective committee. As far as I can recollect, to the best of my information and belief, this certificate of stock in the name of Anderson Fowler, No. 3021, was deposited by Anderson Fowler, with the committee about the date of said certificate, May 22, 1893, and took the place and stead of a certificate belonging to Irving H. Brown, who was one of the original signers of the stockholders' agreement. Mr. Brown transferred his certificate to Anderson Fowler, and Anderson Fowler procured a new certificate and deposited that certificate with the committee. I have testified that the transferor, Irving Brown, was one of the original subscribers to the protective agreement and Anderson Fowler also was. A new certificate taken out in the name of Anderson Fowler and that was deposited with Mr. Whittemore.

1068

Mr. Gerber: I offer in evidence certificate No. 3021 for 100 shares of the Houston & Texas Central Railway Co., to the order of Anderson Fowler.

By consent of counsel the original certificate need not be marked on its face, there being sufficient identification in the offer of the certificate, as stated by counsel in its introduction in evidence.

Mr. Van Brunt: I object to the receipt of the certificate in evidence on the ground that it is incompetent, irrelevant and immaterial; that there is no proof that it was deposited

with, or produced by, and was continuously in the possession of the stockholders' committee; and the added objection that I particularly call attention to the fact that the scope of the reference is to take proof of the number of shares of the capital stock of the Houston & Texas Central Railway Co., owned and possessed by R. B. Whittemore, Henry Fitch and Russell H. Landale as trustees, and submit that the proof is insufficient to show that the certificate in question was either owned or possessed by such trustees. 1070

Cross Examination by Mr. Van Brunt:

Regarding what proof was required of the ownership of the certificates on account of which the owners signed, when the original agreement was signed by the various depositors with the committee, I am not quite positive, but I believe the certificates were produced by the owners. They were deposited with the committee. From the time of their deposit with the committee, Mr. Henry Fitch, and R. B. Whittemore took charge of the certificates. The other member of the committee, Mr. A. S. McClelland, was a native of Glasgow, Scotland, and was only here at different periods. 1071

GEORGE W. JEWETT, called as a witness by the complainant, being duly sworn, testified:

Examined by Mr. Gerber:

I am a stock broker, and have been such for 24 or 25 years. I have had business connection with R.

1072 George W. Jewett—Direct and Cross Examination.

B. Whittemore. He was my partner in the firm of Jewett Bros. for seven or eight years. I cannot tell exactly. I should say eight or nine years. Regarding the certificates of stock of the Houston & Texas Central Railway Co. which have already been read in evidence while the preceding witness was upon the stand, being certificates Nos. 10,790, 10,789, 10,788, 10,787, 3,021, 10,938, 10,937, 10,706, 10,705 and 2,855, I never saw them until I went into Mr. Whittemore's box yesterday or the day before, when Mr. Fitch telephoned that he wanted some papers, and found this package, and took them over to Mr. McLanahan. The envelope was marked R. B. Whittemore. I looked at them, and saw they were certificates of stock of the Houston & Texas Central Railway Co. I turned them over to Mr. McLanahan. Further I know nothing about them. Those certificates were absolutely not the property of Jewett Bros.

Cross Examination by Mr. Van Brunt:

1074 The receptacle in which I found those certificates was a place where Mr. Whittemore kept his private papers.

SCOTT McLANAHAN, called as a witness by the complainant, being duly sworn, testified:

Examined by Mr. Gerber:

I am an attorney. I am attorney for the Whittemore estate. Regarding the certificates of stock now shown me, being the same showed to the preceding witness, Mr. Jewett, I saw them for the first time about three weeks ago or four weeks ago, in

Scott McLanahan—Direct, Cross and Re-direct Examination. 1075

company with Mr. Jewett, when we opened a private box of Mr. Whittemore's containing his various papers, and about that time or soon after that the certificates were delivered to me, and have been in my possession until a few days ago, when I took them over to Mr. Landale.

Cross Examination by Mr. Van Brunt:

As to what information I have that leads me to characterize the receptacle from which those certificates were taken as a private box of Mr. Whittemore, I understood that from Mr. Jewett. As a matter of fact I cannot state from my own knowledge that it was Mr. Whittemore's. They were thereafter delivered to me as attorney for Mr. Whittemore's estate. Mr. Jewett did not know what disposition should be made of them. As to what led me to deliver those to Mr. Landale, well, I discovered from the other papers along with the certificates that Mr. Fitch was a member of the minority stockholders' committee of this railroad, and Mr. Landale introduced Mr. Fitch to me and represented him as the Mr. Fitch who was a member of the committee, and Mr. Jewett told me that these certificates were held by Mr. Whittemore as a member of that committee, and I turned them over to Mr. Landale and Mr. Fitch and took their receipt for them. As to the other papers to which I refer, there were two deposit agreements. I have a receipt for some other paper in connection with the matter, I have forgotten just what. That is the only evidence that I have that those certificates purported to belong to the committee. 1076 1077

Re-direct Examination by Mr. Gerber:

The deposit agreements that were with these certificates were deposit agreements respecting the

1078 Russell H. Landale, Recalled—Cross Examination.

Houston & Texas Central Railway Co. I understood that deposit agreement was made between the stockholders and the committeemen. I have not read the agreement carefully. That is the paper that I referred to on my cross examination that I found in that box with these certificates. The paper now shown me is the other.

1079 Mr. Gerber: I offer in evidence the two papers identified by the witness, headed "The Houston & Texas Central Railway Company, Agreement of Minority Stockholders."

Mr. Van Brunt: Objected to as immaterial and irrelevant, and especially to the exhibit signed Renssalaer Stone, as having no connection with any of the matters testified to and in no wise identifying the certificates.

Received and marked Complainants' Exhibits Nos. 15 and 16.

1080 RUSSELL H. LANDALE, a witness for complainants, recalled by the defendant for cross examination:

Cross Examination by Mr. Van Brunt (resumed):

I have testified from a certain record. As to when that record was made, I know that it was made by Mr. Henry Fitch about twenty-six or seven years ago, beginning about the time the committee was organized, and it is the record that Mr. Fitch has always kept. That record was begun in November, 1889. A large number of those entries are dated. I cannot say that those entries were made when they bear date. I cannot testify

as to the correctness of those entries. Regarding the source of my information in respect to the transfer of the certificate stated to have been deposited by Mr. Brown, in the name of Anderson Fowler, the source of that information was that I was attorney for the committee, and was thoroughly acquainted at that time with the whole transaction. Mr. Fowler at that time was a client of mine. Mr. Irving Brown was a depositor with the committee, and they arranged the deposit, and I told them how to do it. I have personal information of the fact that Fowler purchased Brown's shares. As to the serial numbers as shown by the record of the certificates deposited by Mr. Cranitch, there is no serial number given there. I do not know anything at all about whether Mr. Whittemore owned any stock of the Houston & Texas Central Railway Co. which was not deposited with the committee. The committee has an agreement similar to the agreements marked in evidence, signed by Mr. Ingraham. It is on the record here. It has such an agreement with Mr. Cranitch. You have it in your hand there. It has such an agreement with Mr. Fowler. I personally signed such an agreement; signed it twice, Russell H. Landale and then R. H. Landale. That was for the 100 shares which was included in the original statement of the holdings of the committee. That is one agreement. The other is for the certificates now produced, and other certificates, too. Here they are, R. H. Landale and Russell H. Landale, 300 shares all told, including this 100 shares here. I have stated that I was personally acquainted with the dealings of Mr. Brown and Mr. Fowler in respect to the deposit of these certificates. As to a like knowledge of the deposit by Mr. Ingra-

1084 *Henry Fitch, Recalled—Direct Examination:*

ham, I knew nothing about the deposit of Mr. Ingraham. I always tried to find that stock, and never could. I never knew about Mr. Cranitch. I only met Mr. Cranitch, I think, once or twice in my life. That is all I know of Cranitch or about Cranitch.

Re-direct Examination by Mr. Gerber:

1085 I have been the attorney for the protective committee from its inception. I organized it.

HENRY FITCH, recalled by the complainant, testified as follows:

Direct Examination by Mr. Gerber:

1086 I have been a member of the protective committee of stockholders since its inception. I have before me a book, concerning which the witness Landale has given some testimony. It is a record of the certificates of stock received by the committee of the Houston & Texas Central Railway Co., and it is in my handwriting. Those respective entries were made in 1889. They were made at the time of the deposit of the stock with the committee. Those entries correctly state the facts respecting the stock deposited with the committee. Respecting the stock of D. P. Ingraham, Jr., he deposited with the committee 200 shares. My record shows the serial numbers of the certificates deposited. They are 10787 to 10790. J. A. Cranitch deposited 200 shares with the committee. I failed to get the numbers. R. H. Landale deposited with the committee 400 shares, of which 100 was sold, leaving only 300. My book shows that included in the 300 were 100 shares, certificates Nos. 10937 and 10938. I myself and Mr.

Whittemore took possession of these original certificates of stock which were deposited with the committee. Mr. Whittemore had access to the box containing the certificates, as well as myself.

Cross Examination by Mr. Van Brunt :

Regarding the list produced at a former hearing, and which list did not include any of the certificates now produced, that list was made up here. We had all those certificates here. They were present at our last meeting. We included all the stock that we had on hand here. We could not find that 600 shares, and therefore could not put it on that list. I knew at the time that I made up that list that the same did not contain all the certificates which were listed in the book which I have just produced. There are no certificates listed in that book that have not yet been produced. This completes the list. With the production of these 600 shares the certificates listed in that book are fully accounted for. It is a fact that certain of the certificates deposited with the committee were sold for the purpose of raising funds to carry on the litigation. Those certificates have not been produced. Those certificates are contained in the list in the book. I have not testified as to the serial numbers or the names in which the certificates sold stood. I kept a separate list of the sales of stock. Yes, I kept a separate list of the sales of stock ; but the certificates which were sold appear in the original list. I don't know positively whether Mr. Whittemore owned any stock of the Houston & Texas Central Railway Co. which he did not deposit with the committee. They always said that he hadn't any.

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1089

1090

Henry Fitch—Re-Direct Examination.

Re-direct Examination by Mr. Gerber:

1091

That former list of certificates of stock which was offered in evidence when I was examined before, was made up from the certificates which were actually produced at that time. For that reason the 600 shares produced to-day were not included in that list. In addition to the certificates of stock which were produced at the former hearings and those produced to-day, certain certificates of stock were sold by the committee to raise funds to carry on this litigation. I could not produce any of those certificates that were sold. Taking the list containing the certificates which were produced at the former hearings, and the stock which was produced to-day, and the stock which I sold, those three items include and cover all the certificates of stock which appear as having been deposited with the committee, as per my record here; so that if you exclude, as I do, the stock which has been sold, I have now produced all the certificates of stock in the possession of the committee as appearing by my record. Seven hundred shares of stock were sold by the committee. I have the serial numbers of the certificates that make up those 700 shares. They are 500 shares in the name of Rensselaer Stone, five certificates, 100 shares each, Nos. 2837, 2838, 2839, 2840 and 2841; 100 shares in the name of R. H. Landale, Nos. 10841 and 10842, 50 shares each; 100 shares in the name of R. S. Sillcocks, No. 2621.

1092

Hearing adjourned to July 21, 1916.

Petition by Sara Rosenfeld for Leave to Intervene. 1099

(Filed June 1, 1916.)

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

1100

The petitioner, Sara Rosenfeld, respectfully shows to the Court:

That your petitioner and Rosetta Cohn are executrices under the Last Will and Testament of Charles Minzesheimer, who at the time of his death resided in the County and State of New York, and was a stockholder of the Houston & Texas Central Railway Company, owning two hundred shares of the stock of said Company, which were purchased by him several years prior to the foreclosure and reorganization of said railroad, set forth in the complaint in this suit.

1101

Said Charles Minzesheimer was a dealer in stocks, bonds and investment securities, and for many years was a member of the New York Stock Exchange and one of its Board of Governors. He died in the City of New York on April 1, 1916. His will was admitted to probate by the Surrogates' Court of the County of New York, and letters testamentary were issued to your petitioner

1102 Petition by Sara Rosenfeld for Leave to Intervene.

and said Rosetta Cohn on April 19, 1916, and they qualified as such executrices on that day and are now in possession of said two hundred (200) shares of Houston & Texas Central Railway Company stock.

1103 This suit is a representative action brought by the plaintiffs on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company similarly situated, who may desire to come in and contribute to the expenses of the action. The petitioner's testator, Charles Minzesheimer, was during his lifetime, and his executrices have been since his death, similarly situated to the plaintiffs; the said Minzesheimer was, at the time of the acts complained of in the complaint, and up to his death, a stockholder of said Houston & Texas Central Railway Company.

On information and belief your petitioner alleges all the facts and allegations set forth in the bill of complaint herein are true, and refers to said bill of complaint and the facts and allegations therein contained and adopts them with the same force and effect as though herein set forth at length.

1104 The trial of this suit was terminated in favor of plaintiffs, by an entry of the decree on the 13th day December, 1915, wherein it was ordered adjudged and decreed that the defendant, Southern Pacific Company, holds in its possession and under its control $129\frac{2}{5}$ shares of the common stock of the Houston & Texas Central Railroad Company for every 100 shares of stock of the Houston & Texas Central Railway Company owned and held under the circumstances set forth by the plaintiffs in this suit, and which ownership is exactly similar to the ownership of the two hundred (200) shares of said Houston & Texas Central Railway

Petition by Sara Rosenfeld for Leave to Intervene. 1105

Company stock, which were owned by your petitioner's testator, Charles Minzesheimer.

Your petitioner is informed and believes that the hearing before the Special Master appointed to report certain matters by the terms of said decree, has been terminated, and that a final decree is about to be presented to this Court.

Your petitioner is ready and willing to comply with such reasonable terms as the Court may impose for permitting your petitioner and Rosetta Cohn, as executrices of Charles Minzesheimer, to intervene as parties plaintiff. 1106

WHEREFORE, your petitioner prays that an order may be made upon this petition, permitting your petitioner and Rosetta Cohn to intervene as parties plaintiff, in order that they may have the benefit of any decree or judgment entered herein.

And your petitioner will ever pay, etc.,

No previous application for the relief herein asked for has been made to any Court or Judge.

Dated, New York, May 26, 1916.

GEORGE GORDON BATTLE, 1107

Petitioner's Solicitor,

Office and Post Office Address,

37 Wall Street,

Manhattan,

New York City.

SARA ROSENFELD,

Petitioner.

(Petition verified but verification omitted.)

1108 Answer of Defendant to Rosenfeld-Cohn Petition for Leave to Intervene.

(Filed July 14, 1916.)

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK.

1109

**HENRY L. BOGERT et al.,
Complainants,**

against

**SOUTHERN PACIFIC COMPANY,
Defendant.**

Southern Pacific Company, for answer to the petition of Sara Rosenfeld, dated May 26, 1916, shows to the Court as follows:

1110

It denies upon information and belief that the above entitled action is a representative action and that petitioner's testator, Charles Minzesheimer, was during his lifetime, and his executrices have been since his death similarly situated to the plaintiffs.

In answer to the adoption by the petitioner of the facts and allegations set forth in the bill of complaint, it begs leave to refer to and adopt its answer thereto, and asks that the same be considered as incorporated in this answer.

It refers to the decree entered herein on the 13th day of December, 1915, for the terms and conditions thereof and prays that the same may be produced upon the hearing of this application.

It admits that the hearings before the Special Master appointed by said decree have been ter-

Two Affidavits of Russell H. Landale on Rosenfeld-Cohn Petition for Leave to Intervene. 1111

minated and alleges that no report has yet been filed by said Special Master.

It has no knowledge or information in respect to any of the allegations in said petition contained except as hereinabove denied, admitted or explained, and therefore denies the same.

Dated, New York, June 14, 1916.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant,
Southern Pacific Company,
Office and Post Office Address, 1112
No. 54 Wall Street,
Borough of Manhattan,
New York City.

**Two Affidavits of Russell H. Landale
on Rosenfeld-Cohn Petition for
Leave to Intervene.**

(Both filed June 14, 1916.)

DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK. 1113

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

Russell H. Landale, being duly sworn, deposes and says:

That he is a member of the Committee of Minority Stockholders of the Houston & Texas Central

1114 Two Affidavits of Russell H. Landale on Rosenfeld-Cohn Petition for Leave to Intervene.

Railway Company, and has charge of the stock deposited and the books and affairs of the said committee.

The stockholders, prior to 1891, deposited with said committee over 17,000 shares of stock, and gave to the Committee, for expenses and attorneys' fees, 25% of their stock, and at that and subsequent times paid the committee assessments amounting to at least one dollar a share.

1115 The committee has employed, for the benefit of minority stockholders, various leading lawyers and has made contracts with them to pay them from the stock and money deposited with it, and has agreed with all of the attorneys that they shall receive as fees a certain percentage of all stock deposited with the committee, and subsequently received by the committee from stockholders who might deposit with the committee or otherwise come in and participate in the benefits of the litigation.

1116 The various attorneys who are at present conducting this litigation are willing to have the costs and fees imposed upon the stockholders who may now become parties to the litigation paid to the stockholders' committee, so that the stockholders' committee can, in turn, meet the expenses of the litigation and make proper distribution of fees in accordance with the agreement made by it with its various attorneys.

The expenses of the committee on account of the litigation to date not including any attorneys' fees is considerably in excess of one dollar a share of the stock deposited.

The committee, on behalf of the stockholders and also the attorneys, are willing to accept one dollar a share and twenty-five per cent. of the stock for

Two Affidavits of Russell H. Landale on Rosenfeld-Cohn Petition for Leave to Intervene. 1117

fees and disbursements from the new parties that may come in and become parties to this suit and receive the benefits of this litigation.

RUSSELL H. LANDALE.

Sworn to before me this
6th day of June, 1916.

HENRY GORHAM, JR.,
Notary Public Kings Co.,
Certificate filed in New York Co. 1118

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

1119

State of New York, } ss:
County of Kings, }

Russell H. Landale, being first duly sworn, deposes and says: I am one of the Trustees of the stockholders of the Houston & Texas Central Railway Company. I am familiar with all the steps and proceedings taken on behalf of the minority

- 1120 *Two Affidavits of Russell H. Landale on Rosenfeld-Cohn Petition for Leave to Intervene.*
-

stockholders of the Houston & Texas Central Railway Company to enforce their rights and was counsel for the complainant in the case of Carey against the Houston & Texas Central Railway Company, which was begun in

- 1121 Charles Minzesheimer has never deposited his stock with the said Trustees and said trustees at no time represented or purported to represent the said Charles Minzesheimer, and none of the plaintiffs who brought any of the suits at the request of said trustees and on behalf of the stockholders who had deposited their said stock with said trustees, acted or purported to act on behalf of said Charles Minzesheimer, excepting that the plaintiffs claim that this action is brought on behalf of all stockholders similarly situated.

The executrices under the Last Will and Testament of Charles Minzesheimer, deceased, have never deposited the stock held by Charles Minzesheimer in his lifetime with said trustees.

RUSSELL H. LANDALE.

1122

Sworn to before me this
14th day of June, 1916.

PERCY G. B. GILKES,
Notary Public,
Kings Co., N. Y.

Order Granting Sara Rosenfeld and Rosetta Cohn 1129
Leave to Intervene.

complainant, and the defendant, and upon consideration thereof.

NOW, on motion of George Gordon Battle, attorney for the petitioner, it is

ORDERED: That said motion be and the same hereby is, in all respects, granted, upon condition, however, that the petitioner contribute to the expenses of this action, on the same terms as the complainants and all other minority stockholders 1130 similarly situated, who have come in and secured the benefits of this litigation, to wit, an interest to the extent of, equal to and measured by twenty-five per cent. of the stock of the Houston & Texas Central Railway Company, of the petitioner, and one dollar per share for each share of the petitioner's said stock, to be paid to complainant's attorneys; said cash to be paid within ten days from the date, hereof, whereupon the petitioner, Sara Rosenfeld and Rosetta Cohen, as executrices under the last will and testament of Charles Minzeheimer, deceased, shall become parties to this action; and it is 1131

FURTHER ORDERED: That Joseph G. Cochran, Special Master, take proof of the allegations contained in the petition, and also proof of the allegations contained in the answer to said petition, filed by the defendant herein and include same in his report.

THOMAS I. CHATFIELD,
 U. S. D. J.

1132 Notice of Motion by Michael Gernsheim for Leave to Intervene.

(Filed July 7, 1916.)

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

1133

against

SOUTHERN PACIFIC COMPANY,
Defendant.

Sirs:

1134

PLEASE TAKE NOTICE that upon the annexed petition of Michael Gernsheim, verified the 30 day of June, 1916, and upon the pleadings and all proceedings had herein, the undersigned will move this Court, at a Term thereof, to be held in the United States Court House and Post Office Building, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 12th day of July, 1916, at two o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, for an order permitting the said Michael Gernsheim to intervene and be made party plaintiff in the above entitled action, and for such other and fur-

*Notice of Motion by Michael Gernsheim for Leave
to Intervene.* 1135

ther relief as to the Court may seem just and proper.

Dated, New York, July 6, 1916.

Yours, etc.,

GEORGE GORDON BATTLE,
Solicitor for Petitioner,
Office and Post Office Address,
37 Wall Street, 1136
Borough of Manhattan,
New York City.

To

MESSRS. DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainants,
32 Broadway,
Borough of Manhattan,
New York City.

MESSRS. JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant. 1137
54 Wall Street,
Borough of Manhattan,
New York City.

1138 **Petition by Michael Gernsheim for
Leave to Intervene.**

(Filed July 7, 1916.)

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF NEW YORK.

1139

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

The petitioner, Michael Gernsheim, respectfully shows to the Court:

1140

That your petitioner owns 740 shares of stock of the Houston & Texas Central Railway Company, all of which were purchased by him prior to the foreclosure and reorganization of said railroad, set forth in the complaint in this suit, and four hundred of said shares were purchased in 1881 for \$102 a share. Your petitioner has been a stockholder of said Houston & Texas Central Railway Company since 1881. Your petitioner, during said period when said purchases of said stock were made, was a member of the New York Stock Exchange.

This suit is a representative action, brought by the plaintiffs on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company, similarly situated, who may desire to come in and contribute to the expenses of the

Petition by Michael Gernsheim for Leave to Intervene. 1141

action. Your petitioner, at the time of the acts complained of in the complaint, was a stockholder of said Houston & Texas Central Railway Company, and ever since then, and now is, similarly situated to the plaintiffs.

On information and belief, your petitioner alleges that all the facts and allegations set forth in the bill of complaint herein are true, and refers to said bill of complaint and the facts and allegations therein contained and adopts them with the same force and effect as though herein set forth at length. 1142

The trial of this suit was terminated in favor of plaintiffs, by an entry of the decree on the 13th day of December, 1915, wherein it was ordered, adjudged and decreed that the defendant, Southern Pacific Company, holds in its possession and under its control $129\frac{2}{5}$ shares of the common stock of the Houston & Texas Central Railroad Company for every 100 shares of stock of the Houston & Texas Central Railway Company, owned and held under the circumstances set forth by the plaintiffs in this suit, and which ownership is exactly similar to the ownership of the seven hundred and forty (740) shares of said Houston & Texas Central Railway Company stock, which are owned by your petitioner. 1143

Your petitioner is informed and believes that the hearing before the Special Master appointed to report certain matters by the terms of said decree, has been terminated, and that a final decree is about to be presented to this Court.

Your petitioner is ready and willing to comply with such reasonable terms as the Court may im-

1144 *Petition by Michael Gernsheim for Leave to Intervene.*

pose for permitting him to intervene as party plaintiff.

WHEREFORE, your petitioner prays that an order may be made upon this petition permitting your petitioner to intervene as party plaintiff, in order that he may have the benefit of any decree or judgment entered herein.

1145 And your petitioner will ever pray, etc.

No previous application for the relief herein asked for has been made to any Court or Judge.

Dated, New York, June 30, 1916.

MICHAEL GERNSHEIM,
Petitioner.

(Petition verified, but verification omitted.)

1146

Answer of Defendant to Gernsheim 1147
Petition for Leave to Intervene.

(Filed July 12, 1916.)

DISTRICT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

1148

Southern Pacific Company, for answer to the petition of Michael Gernsheim, dated the 30th day of June, 1916, shows to the Court as follows:

It denies, upon information and belief, that the above entitled action is a representative action, and that the petitioner is similarly situated to the plaintiffs.

In answer to the adoption by the petitioner of the facts and allegations set forth in the bill of complaint, it begs leave to refer to and adopt its answer thereto, and asks that the same be considered as incorporated in this answer. 1149

It refers to the decree entered herein on the 13th day of December, 1915, for the terms and conditions thereof, and prays that the same may be produced upon the hearing of this application.

It admits that the hearings before the Special Master appointed by said decree have been terminated, and alleges that no report has as yet been filed by said Special Master.

1150 *Answer of Defendant to Gernsheim Petition for
Leave to Intervene.*

1151 Upon information and belief, it alleges that the petitioner is the same Michael Gernsheim who, in September, 1889, on behalf of himself and other stockholders of the Houston & Texas Central Railway Company, through Messrs. Dittenhoefer & Gerber, being the same firm of attorneys who are the attorneys for the plaintiff in the present action, began suit in the Supreme Court of the County of New York to vacate the decree of foreclosure and restrain the carrying out of the reorganization agreement. In said suit an injunction was applied for and Mr. Justice Patterson held that the Court had no power to review or to vacate the decree, and that upon the question whether the so-called assessment upon the stock was excessive, the plaintiff had the right to be heard, and he therefore granted an injunction restraining the delivery of the new stock pending the trial of the action. (See Opinion, Patterson, J., reported in 7 N. Y. Supp., 872).

1152 Upon appeal, the order was reversed, the higher Court holding that Justice Patterson was correct in his decision that the Supreme Court could not review or vacate the foreclosure decree, but that he was in error in deciding that the plaintiff could litigate in that action the question as to the amount of the so-called assessments. (See 31 N. Y. State Reporter, 321.) Upon the trial, it was held that the assessment had not been regularly made, because the Trust Company, which was to act under the plan of reorganization, had delegated its functions in that regard to certain of its officers and employees. Thereafter, the assessment was again made by the Trust Company, and thereupon Gernsheim and his associates began a second suit and applied for an injunction, which application was

*Answer of Defendant to Gernsheim Petition for
Leave to Intervene.* 1153

denied. (40 N. Y. State Reporter, 967.) Upon appeal, this decision was affirmed. (See 41 New York State Reporter, 973.)

Upon information and belief, that the petitioner never deposited his stock with the Trustees or Committee who were acting in behalf of minority stockholders, and in whose interests the persons who deposited said stock with said Committee, the present complainants, brought the present suit.

It has no knowledge or information in respect to any of the allegations of said petition contained, except as hereinabove denied, alleged, admitted, or explained, and therefore denies the same. 1154

Dated, New York, July 12, 1916.

JOLINE, LARKIN & RATHBONE,
Solicitors for Southern Pacific Company,
Office and P. O. Address,
54 Wall Street,
Manhattan,
New York, N. Y.

1155

**1156 Order Granting Michael Gernsheim
Leave to Intervene.**

(Filed July 12, 1916.)

At a Stated Term of the United States District Court, held in and for the Eastern District of New York, at the United States Court House and Post Office Building, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 12th day of July, 1916.

1157

Present—Hon. THOMAS I. CHATFIELD, District Judge.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

1158

The motion of Michael Gernsheim, for leave to intervene as a party plaintiff in this action, and for other relief prayed for in the petition, came on to be heard at this term.

NOW, on reading the notice of motion and petition, dated the 6th day of July, 1916, the answer to the petition, filed by the defendant, and upon all the pleadings and proceedings herein, and after hearing counsel for the petitioner, and for the complainants and the defendant, and upon consideration thereof,

Order Granting Michael Gernsheim Leave to Intervene. 1159

NOW, on motion of George Gordon Battle, attorney for the petitioner, it is

ORDERED that said motion be and the same hereby is, in all respects, granted, upon condition, however, that the petitioner contribute to the expenses of this action, on the same terms as the complainants and all other minority stockholders similarly situated, who have come in and secured the benefits of this litigation, to wit, an interest to the extent of, equal to and measured by twenty-five per cent. of the stock of the Houston & Texas Central Railway Company of the petitioner, and one dollar per share for each share of the petitioner's said stock to be paid to complainants' attorneys; said cash to be paid within ten days from the date hereof, whereupon the petitioner, Michael Gernsheim, shall become a party to this action; and it is 1160

FURTHER ORDERED that Joseph G. Cochran, Special Master, take proof of the allegations contained in the petition, and also proof of the allegations contained in the answer to said petition, filed by the defendant herein, and include the same in his report. 1161

THOMAS I. CHATFIELD,
U. S. D. J.

**1162 Reference Before Special Master—
Continued.**

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

1163	<hr/> <p>HENRY L. BOGERT et al., Complainants, against SOUTHERN PACIFIC COMPANY, Defendant.</p> <hr/>	}
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Brooklyn, New York, July 21, 1916.

Before JOSEPH G. COCHRAN, Esq., Special Master.

Hearing resumed pursuant to adjournment of
June 30, 1916.

Same appearances.

1164 Mr. Gerber: The complainant offers in evidence the order dated July 6, 1916, entered on the petition of Sarah Rosenfeld, as executrix under the last will and testament of Charles Minzesheimer, deceased, for leave to intervene as a party plaintiff in this action; also the order entered July 12, 1916, on the petition of Michael Gernsheim, for leave to intervene as a party plaintiff in this action; the originals thereof being on file.

(NOTE.—The petitions and the orders referred to in the foregoing statement, together with all other papers relating thereto, are printed at pages 365 to 387 of this record.

ALBERT C. MAURICE, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct Examination by Mr. Gerber:

I am a lawyer. I am not a member of any firm. I am employed by Stern & Gotthold, at 60 Wall Street, who are the attorneys for Sara Rosenfeld, the executrix. As to the two certificates now shown me of stock of the Houston, Texas, Central Railway Company, one for 100 shares, serial No. 2,920 and the other for 100 shares, serial No. 2,729. I saw those two certificates first on the 22nd day of April, 1916. I saw them at the safe deposit vault of the Fifth Avenue Bank. I went there on that date with Mrs. Rosenfeld, the executrix, and Mr. Lown, representing the State Comptroller's Office, and the safe deposit box in the name of Charles Minzesheimer was opened, and these two certificates were in that box. The Charles Minzesheimer I refer to is the testator of whom Sarah Rosenfeld is the executrix.

1166

WILLIAM F. BANKS, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

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Direct Examination by Mr. Gerber:

As to my business, I am with Clark, Dodge & Company, bankers and brokers. They are a Stock Exchange firm. Regarding the certificate now shown me of the Houston, Texas, Central Railway Company for 100 shares, bearing serial No. 2,729, purporting to contain the endorsement of guarantee of Clark, Dodge & Company, that is their sig-

1168 William F. Banks—Direct and Cross Examination.

nature—Mr. D. Crawford Clark's signature. He is a member of that firm and was at that time. I have been connected with Clark, Dodge & Company twenty-six years.

Q. I show you also, call your attention also to the name of the witness, Horace P. Gates, to the endorsement or power of attorney and blank assignment on the back of the certificates to which I have called your attention, serial No. 2,729, and ask you whether you know that signature.

1169 Mr. Freedman: That I object to as immaterial and irrelevant.

A. Yes, I know that signature. Mr. Gates was our bookkeeper for, well, twenty-five or thirty years. I have seen him write frequently, thousands of times. I know that is his signature. Clark, Dodge & Company do business at 51 Wall Street, Borough of Manhattan. They have been doing business in the Borough of Manhattan, to my knowledge, thirty-five years. I believe sixty-four is their record.

1170 Cross Examination by Mr. Freedman:

I know nothing of the paper shown me other than the signatures which I have identified.

Mr. Gerber: I offer in evidence Article 9 of the by-laws of the New York Stock Exchange in force prior to and in 1889, being in force from and prior to 1882.

Mr. Freedman: I object to it as incompetent, irrelevant and immaterial, the objection of incompetency not going to the fact that the original rule is not produced or authenticated by an officer of the New York Stock Exchange.

Mr. Gerber: I will read it.

"Article 9. Section 1. In the delivery of stock of which but one transfer day is allowed, the receiver shall have the option of receiving said stock by certificate and power irrevocable, in the name of, witnessed or guaranteed by, a member of the Exchange, or a firm represented at the Exchange, resident or doing business in New York, or by transfer thereof."

Then the resolution of the Governing Committee, May 24, 1882, being part of the same section:

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"In the case of powers of attorney or substitution, not executed or witnessed by a member of the Exchange, or a firm represented at the Exchange, the endorsement of a member or such a firm is to be considered a guarantee of the correctness of the signature of the party executing the same."

I now offer in evidence from the rules for delivery of the New York Stock Exchange, Article 15, which is in force at the present time.

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Mr. Freedman: I make the same objection.

Mr. Gerber: The same being as follows: "An endorsement by a member or a firm registered and doing business in the Borough of Manhattan of (or the signature as a witness by such a member of a signature to) an assignment or a power of substitution, is a guarantee of its correctness. Each power of substitution, as well as assignment, must be so guaranteed or witnessed."

I now offer in evidence certificate of the Houston, Texas, Central Railway Company,

1174

Stewart Brown—Direct Examination.

serial No. 2,729, issued August 31, 1883, for 100 shares, together with the assignment and power of attorney and substitution in blank on the back of the certificate bearing date September 6th, 1886, purporting to be signed by Edward Colgate, in whose name the certificate stands, witnessed by Horace P. Gates, guaranteed, "Clark, Dodge & Company."

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Mr. Friedman: I object to it as immaterial and irrelevant and not tending to prove any issue raised by the petition and the answer in this suit.

It is stipulated that counsel will produce the original certificate at any time, and that it need not be physically marked.

STEWART BROWN, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct Examination by Mr. Gerber:

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I am in the tea, coffee and olive oil business, and I have to admit, wines and liquors. I recognize the signature "Stewart Brown's Sons" on the certificate now shown me of the Houston & Texas Central Railway Company, serial No. 2,920, made out to Stewart Brown's Sons, and signed Stewart Brown's Sons on the endorsement of a blank assignment in blank and power of substitution and transfer. That is the signature of Stewart Brown's Sons, to my knowledge and belief. My father was a member of the firm, William Harmon Brown, and the two other members were my uncles, Alexander Brown and Davison Brown. It was a Stock

1177

Exchange firm and carried on business, as I remember it, at 66 Broadway, in the Borough of Manhattan. I cannot say I have frequently seen the signature of Stewart Brown's Sons, because the firm went out of existence, I believe, about the time of that, 1889 or 1890. Somewhere along there, as I remember it. I know they were in business while I was at college, and I graduated from Princeton in 1887. I have seen the signature frequently enough to know that is the signature. I think it is the signature of Davison Brown. He is alive. If you want to take the trouble to find him, he can tell you absolutely, but as far as I can judge, it is his signature. I have not any doubt it is his signature, as far as I recollect it. The witness is James J. Kernaghan. Regarding Mr. Kernaghan's signature, well, I have seen it in the past. He was a clerk in the office of Stewart Brown's Sons, and previous to that he was with my father, with the old firm of Moller & Brown; he was a boy then. Yes, I am almost certain it is his signature. I don't know whether he is living or not.

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Cross Examination by Mr. Freedman:

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I know nothing of the paper that is shown me other than to identify the signatures. I am not at all prepared to say that that certificate was ever sold or not.

Mr. Gerber: I offer in evidence certificate referred to by the witness, being certificate of the Houston & Texas Central Railway Company for 100 shares, serial No. 2, 920, dated July 31, 1886, and countersigned August 2, 1886, together with the blank assignment and power of substitution and transfer dated September 11, 1886, signed

1180 *Complainants' Documentary Evidence and Stipulation.*

Stewart Brown's Sons, and witnessed by James J. Kernaghan.

Mr. Freedman: I object to it as immaterial and irrelevant and not tending to prove any of the issues raised by the intervening petition and the answer.

It is stipulated that counsel will produce the original certificate at any time, and that it need not be physically marked.

1181

Mr. Freedman: Is that all on the Rosenfeld feature?

Mr. Gerber: Yes.

Mr. Freedman: I move to dismiss the petition on the ground that the intervening petitioner has failed to establish the allegations contained in the petition, has failed to prove that she is at the present time the owner of any shares of stock of the Houston & Texas Central Railway Company, or that she acquired any shares of stock prior to the institution of the suit known as Bogert against Southern Pacific Company.

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Mr. Gerber: Let me ask you, Mr. Freedman, do you want technical proof of the qualification of the executrix? That is, a certificate from the Surrogate that she was formally appointed?

Mr. Freedman: No. What I do want in connection with that proceeding is a stipulation to the effect that the shares of stock were never deposited with the trustees who are now composed of Mr. Landale and others acting on behalf of minority stockholders of the Houston & Texas Central Railway Company.

Mr. Gerber: No objection to that.

MICHAEL GERNSHEIM, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct Examination by Mr. Gerber:

I am seventy-seven years old. I am not in any business at the present time. My business was the banking and brokerage business. The name of my firm was M. Gernsheim & Company, carrying on business in Wall Street. That firm started business in 1881. I was connected with another house prior to that time in the brokerage business. That house was Kuhn, Loeb & Company; I was a partner in Kuhn, Loeb & Company. My wife is related to Mr. Jacob Schiff of that firm. She is a cousin to Mrs. Schiff. I was a member of the New York Stock Exchange for twenty-three years. I am familiar with the custom of the New York Stock Exchange respecting assignments or transfers of certificates of stock; that is to say, what it was at that time, going back to the time when I was a member. That covered from 1874 to 1897.

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Q. Was there any custom that stock would pass if the assignment on the back of the certificate of stock in blank with power of substitution to transfer was either signed, witnessed or guaranteed by a member of the Stock Exchange or a Stock Exchange firm?

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Mr. Freedman: Objected to as incompetent, irrelevant and immaterial.

A. If the stock is signed by a member of the Stock Exchange it makes it a good delivery.

As to its being witnessed, witnessing has nothing to do with it. As to its guarantee, if the stock

is signed by a non-member, it has to be witnessed by a member of the Stock Exchange. That is, in a sense, a guarantee. The signature must be of a member of the Stock Exchange, or a Stock Exchange firm, or a firm of which a member is a member of the Stock Exchange. I am the owner of stock of the Houston & Texas Central Railway Company. I have the certificates of stock with me. Regarding the certificate now shown me for 10 shares of the Houston & Texas Central Railway Company, bearing the serial No. 10,646, M. Gernsheim & Company, endorsed M. Gernsheim & Company, under the date of December 15, 1886, I can

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hardly say when I acquired that certificate. It must be about that time, because it was transferred at that time. You know we did business in 10 shares in New York and London; that is the reason there are 10-share certificates. I did, however, have this certificate as early as 1881. That I remember, the 1881; I remember we bought it in 1881. I remember I bought it of S. W. Boocock & Company on the day when Garfield died, at above par. It was on that day, because I remember in the morning I

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bought two or three hundred shares of Boocock, and after I had it, he looked excited, and I asked him, "Boocock, you look excited. What is the matter?" He said, "I just came from Prince & Whitley's"—or Chady, Prince & Company, I forget which it was—"office, and I just heard that Garfield is shot." That is the reason I remember. I bought 200 or 300 shares on that day. I paid for them above par. I am still possessed of the amount of stock I purchased on that day. I never could get rid of it. I was the senior member of the firm of M. Gernsheim & Company. That firm subsequently dissolved in 1892 or 1893. I had all

the assets of the firm and I acquired the assets. That is, all the assets were mine.

Mr. Gerber: Now, I offer in evidence this certificate, serial No. 10,646, identified by the witness.

Mr. Freedman: I object to that as immaterial and irrelevant and not tending to prove any issue raised by the petition and answer.

It is stipulated that counsel will produce the original certificate at any time, and that it need not be physically marked. 1190

Regarding the certificate now shown me of the Houston & Texas Central Railway Company for 10 shares, serial No. 10,647, being the same date as the preceding certificate, namely, July 16, 1881, and the same form, endorsed the same way and on the same day, the evidence that I gave as to the other certificate applies to this certificate.

Mr. Gerber: I offer this one in evidence.

Mr. Freedman: Same objection.

It is stipulated that counsel will produce the original certificate at any time, and that it need not be physically marked. 1191

Regarding the following certificates now called to my attention of the Houston & Texas Central Railway Company, namely: certificates for 10 shares, serial No. 10,648; certificate for 10 shares, serial No. 10,649; certificate for 10 shares, serial No. 10,650; certificate for 10 shares, serial No. 10,651; certificate for 10 shares, serial No. 10,652; certificate for 10 shares, serial No. 10,653; certificate for 10 shares, serial No. 10,654; certificate for

1192

Michael Gernsheim—Direct Examination.

10 shares, serial No. 10,655; certificate for 10 shares, serial No. 10,645, all bearing date the same date as the preceding certificates to which my attention has been called, namely, July 16, 1881, and all purporting to be endorsed in blank on the same date as the preceding certificates, namely, December 15, 1886, my evidence respecting the two certificates to which my attention was formerly called, applies to these other certificates.

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Mr. Gerber: Now, I offer these certificates in evidence to which the witness' attention has been directed.

Mr. Freedman: I object to each of them on the same ground.

It is stipulated that counsel will produce the original certificates at any time, and that they need not be physically marked.

1194

Regarding the certificates now called to my attention, that is certificates for 10 shares, serial No. 11,251; certificate for for 10 shares, serial No. 11,252; certificate for 10 shares, serial No. 11,259; certificate for 10 shares, serial No. 11,260, all dated October 1, 1881, endorsed M. Gernsheim & Company, blank, without any date, my testimony respecting the other certificates applies to these. I account for the change of date, one being July 16, 1881, and the others October 1, 1881, by the fact that, as I told you before, we traded—we sent some shares to London, and they came back again, and we had them re-transferred. We used them also for the purpose of loans. All these endorsements, M. Gernsheim & Company, are in my handwriting. That applies to all, up to now. They are all the same; all signed by me.

Mr. Gerber: Now, I offer these certificates in evidence, to which the witness' attention has just been directed.

Mr. Freedman: I will object to each of them upon the same ground.

It is stipulated that counsel will produce the original certificates at any time, and that they need not be physically marked.

Regarding the following certificates now called to my attention of the Houston & Texas Central Railway Company, each being for 10 shares, each certificate being dated December 7, 1886, countersigned December 8, 1886, and all endorsed in blank, containing the following serial numbers 12,181, 12,182, 12,183, 12,184, 12,185, 12,186, 12,187, 12,188, 12,189, 12,190, I cannot say when I acquired those certificates of stock. It must have been prior to 1886. I cannot tell how long prior. You see, I will tell you, you see those certificates, sometimes we bought them in London, and they came over here, and they came from London in 10 share certificates, and delivery in London is only in 10 share certificates, and for that reason 10 share certificates from London standing in other people's names we had them transferred again in 10 shares, because if you have 100 shares delivered they charge you a dollar, while if you bring in 10 shares, they cannot charge anything; that is the reason we had 10 share certificates. The company charges for transferring,—if you break up 100 shares into 10 share certificates, they charge for transferring.

Mr. Gerber: I offer these certificates in evidence to which the witness' attention has been directed.

1198

Michael Gernsheim—Direct Examination.

Mr. Freedman: I object to each of them upon the same ground.

It is stipulated that counsel will produce the original certificates at any time, and that they need not be physically marked.

1199

Regarding the following certificates now called to my attention of the Houston & Texas Central Railway Company, each being for 10 shares, each certificate bearing date February 14, 1887, countersigned February 15, 1887, and each being made out to M. Gernsheim & Company, endorsed in blank M. Gersheim & Company, and bearing the following serial numbers: 12,209, 12,208, 12,207, 12,206, 12,205, 12,204, 12,203, 12,226, 12,225, 12,224, 12,223, 12,222, 12,221 12,220, 12,219, 12,218, 12,217, 12,216, 12,215, 12,214, 12,213, 12,212, 12,211, 12,210, the testimony which I gave as to the preceding certificates applies to these certificates.

Mr. Gerber: I offer these certificates in evidence.

1200

Mr. Freedman: I object to each one of them on the same ground.

It is stipulated that counsel will produce the original certificates at any time, and that they need not be physically marked.

Regarding the following certificates now called to my attention of the Houston & Texas Central Railway Company, each being for 10 shares, each bearing date November 30th, 1886, countersigned December 1, 1886, to the order of M. Gernsheim & Company, endorsed in blank M. Gernsheim & Company, bearing the serial numbers 12,179, 12,177, 12,180 and 12,178, the testimony which I gave as to the preceding certificates applies to these.

Mr. Gerber: I offer these certificates in evidence.

Mr. Freedman: The same objection and same grounds.

It is stipulated that counsel will produce the original certificates at any time, and that they need not be physically marked.

Regarding the following certificates now called to my attention of the Houston & Texas Central Railway Company, each certificate being for 10 shares, each bearing date December 7, 1886, countersigned December 8, 1886, each to the order of M. Gernsheimer & Company, and each certificate endorsed in blank, bearing the serial numbers as follows: 12,201, 12,191, 12,192, 12,193, 12,194, 12,195, 12,196, 12,197, 12,198, 12,199, 12,200, the testimony which I gave respecting the other certificates of stock applies to these.

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Mr. Gerber: I offer these certificates in evidence.

Mr. Freedman: Same objection on the same ground.

It is stipulated that counsel will produce the original certificates at any time and that they need not be physically marked.

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As to the certificate now called to my attention of the Houston & Texas Central Railway Company, one bearing serial No. 10,680 for 50 shares, to the order of Moritz Woititz, bearing date August 19, 1889, countersigned August 20, 1889, endorsed blank, blank assignment and blank power of substitution to transfer, August 21, 1889, Moritz Woititz, and also bearing the signature of M. Gernsheim & Company, H. D. Walde, I acquired that certificate of stock prior to that time. I cannot say how long prior. Mr. Woititz is a clerk of ours, a

1204

clerk of Gernsheim & Company. When this stock was put in his name it was my stock. It was endorsed by him and delivered back to me. I cannot say how long prior to 1889 I owned that certificate of stock, or the stock represented by that certificate. It was prior to that time; how long before I cannot tell. I cannot say whether it was more than a year or two. I know it was at that time or before.

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I have no personal recollection, none at all; it was then in the possession of that firm; that is all I can say. I have present recollection that I had another certificate representing 50 shares of stock—two fifties. One or two. As to whether these were surrendered for the purpose of getting this certificate and another, or this certificate, certainly we must have another to deliver to have this transferred to his name. My present recollection of why I had it in the clerk's name is that it might have come over from London, to a New York member, and it might have been English names. It was done only for formality's sake. Woititz was a clerk in my office many years. As to another certificate

1206

now shown me of the Houston & Texas Central Railway Company for 50 shares, also made out to the order of Moritz Woititz, also bearing date August 19, 1889, countersigned August 20, 1889, and bearing the serial number 10,681, endorsed August 21, 1889, in the same form as the certificate serial number 10,680, to which my attention was called, my testimony respecting certificate number 10,680 applies to this transaction, serial number 10,681. This is the same Moritz Woititz.

Mr. Gerber: I offer these two certificates in evidence, namely, certificates No. 10,680 and No. 10,681.

Mr. Freedman: I object to them upon the same ground.

It is stipulated that counsel will produce the original certificate at any time and that it need not be physically marked.

I had occasion during the time I owned this stock to make loans on the stock from banks.

Q. Did you ever part with title to any of the stock?

Mr. Freedman: Objected to as incompetent, irrelevant and immaterial.

A. No; you see, if we made loans, the stock came back to us again.

Q. It was simply for security? A. Yes.

Mr. Freedman: I move to strike out the answers as not responsive and incompetent.

Q. When you made loans, did the stock come back to you after you paid the loan? A. Certainly; it is a natural process.

Mr. Freedman: I object to the question as incompetent and calling for the conclusion of the witness; and I move to strike the answer out as incompetent and embodying the conclusion of the witness.

From the time I acquired the certificates of stock in evidence I did not sell any of them. I would not have them if I had.

Cross Examination by Mr. Freedman:

These particular certificates that I have identified I have delivered to other people in precisely the

1210

Michael Gernsheim—Cross Examination.

same shape they are now in. I might have borrowed money on them.

Q. Do you mean to say that none of these certificates have ever been out of your actual possession since the date you bought them?

A. Never, except maybe—I don't say they were—maybe they were in a loan.

Q. That is what I am asking you. Haven't you at some time or other handed these stock certificates over to somebody else?

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A. I say I might have handed over to somebody to borrow money on them.

Mr. Freedman: Now I move that that be stricken out as irresponsible.

Mr. Gerber: I object to striking it out; it is responsive to the question.

Q. I ask you the question, and please answer yes or no. Haven't you at some time or other handed these stock certificates over to some other person?

A. Without losing my right in it.

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Mr. Freedman: I move to strike that out.

Mr. Gerber: I object to striking it out; he has answered the question; it is responsive.

I have at some time or other handed these stock certificates to some other person than the name of the person that appears on these stock certificates. When I so handed them they contained all the signatures and endorsements that are now on them. When these various stock certificates were bought they were bought with the money of my firm. I knew that there was a committee or there were trustees designated to represent the stockholders

1213

of the Houston & Texas Central Railway Company. I never deposited my stock with a committee of that kind or trustees of that kind. I have never had any interest in any of the suits or actions that have been brought on behalf of that committee. I, as the owner of this stock, have brought several suits. I brought the first suit in 1891 or 1892; I don't remember. If you should tell me that the complaint in the first suit was verified on September 26, 1889, that would refresh my recollection, if that is so. It was about that time. That suit was brought in the Supreme Court of the State of New York. I don't remember any more for what purpose I brought that suit. Whatever the paper says, what I said then is good to-day. At the time I brought that suit the Houston & Texas Central Railway Company was in financial difficulties. There had been a default made under one or more of the mortgages. I certainly knew that. I think there had been a foreclosure decree entered directing a sale of the property of the railway. I heard of a plan of reorganization of the railway company. I knew that one was issued. All these facts I knew before I brought this suit in the State Court in New York in 1889.

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Q. Now, didn't you bring that suit to stop the foreclosure and sale of the property?

Mr. Gerber: Objected to on the ground that the papers speak for themselves.

A. I do not remember very well. At that time I began the suit and it was in the court so long—whatever the paper says, I admit it. Whatever I admitted then I admit today.

Mr. Dittenhoefer was the lawyer who brought the suit for me—Dittenhoefer & Gerber. I have no

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Michael Gernsheim—Cross Examination.

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recollection at this time of what took place in this suit of mine; it was twenty-five years ago. As to whether I tried to get an injunction to stop something from being done, I don't remember; I know I submitted the case to Judge Dittenhoefer and the case went on. Whatever I had to sign, as I say, I admit it to-day. If you refresh my memory I can tell you. As to what happened to that suit, well, I remember that it was dismissed, something like that. I had to give it up, the suit. As to whether I then brought a second suit, I really don't remember if it was one suit, two suits or three; I don't remember. I stopped bringing suits when it was decided against me. I don't know when that was. You see I went to Europe. I lived in Europe for so long a time; and I don't know what was going on. I went to Europe in 1897. It was before I went to Europe. As to whether it was quite some time before I went to Europe or just before I went, it was some—I cannot remember.

1218

Mr. Gerber: I object to the question of dates and contents of records, all of which are in evidence now or are matters of record, and the best evidence is the record itself.

As to whether it was quite some time before I went to Europe, or just before I went to Europe, it must have been—I cannot say. Shall I say I believe? I believe 1895; I don't know. From the time I went to Europe I did not do anything attempting to enforce any right of a stockholder as owner of any of the stock of the Houston & Texas Central Railway Company. I did not do anything. I did not ask anybody to do anything on

my behalf. Since the time I went to Europe I have taken no steps at all to protect any rights I may have had as stockholder of the Houston & Texas Central Railway Company. I thought if there is anything to be done, I have a right to come in, as generally these suits are brought for all stockholders alike. But I took no step myself. I cannot say when I first heard that Walter B. Lawrence had brought a suit against the Southern Pacific Company as the sole defendant. Somebody called me up on the telephone and told me if I had stock in the Houston-Texas, and that he is similarly situated as I am, and what I intended to do. I would not give him any answer, and I went down to Dittenhoefer's and told him I want to intervene. That is not the first time I heard about the Lawrence suit or the Bogert suit. I knew there was a suit going on since I am back from Europe. As to what kind of a suit it was or what it was brought for I don't know today yet. I cannot remember when this person called me up on the telephone I have mentioned. It might have been five or six months ago. To the best of my knowledge and belief the papers that I signed in this old litigation of mine and the affidavits I made were true at the time I made them, and they are true at the present time.

1220

1221

Re-direct Examination by Mr. Gerber:

I was asked whether I did not hand the certificates of stock, which are in evidence, to some other person. I shall make very plain what I meant when I said I handed them to some other person. I come to you and say, "Please lend me \$10,000," and you say, "Yes." I give you Houston-Texas stock as collateral. Two days afterwards I pay you back

1222

Michael Gernsheim—Re-Direct Examination.

your \$10,000 and you give me back my stock. I did not sell any of the stock. If I would have sold it I could not have it. I was asked regarding the moneys of the firm which were used to acquire this stock. I was the senior member of the firm and the capitalist. My other partners were my two brothers-in-law. I owned all of the capital and assets. I acquired all the assets on dissolution. I told about some one calling me up respecting the Lawrence case. It was not anybody on behalf of Dittenhoefer, Gerber & James that called me up.

1223

It is a fact that after the termination, the active termination of my litigations against the Southern Pacific Company—against the Houston & Texas Central Railway Company—I frequently called at the office of Dittenhoefer, Gerber & James, and saw Judge Dittenhoefer and Mr. Gerber. I kept in touch with the litigations that were then pending and going on, in which they were interested as attorneys. I mean respecting the Houston & Texas Central Railway Company foreclosure and reorganization. I knew that during all these years litigations were going on through Dittenhoefer, Gerber & James as attorneys representing stockholders on behalf of stockholders of the old railway company.

1221

Q. And is it not also a fact that you were told by Judge Dittenhoefer that he would inform you of the right time when to intervene in the suit which was pending against the Southern Pacific Railway Company?

Mr. Freedman: That is objected to as incompetent, irrelevant and immaterial.

A. Yes.

I knew during all these years various litigations were being conducted in the offices of Dittenhoefer, Gerber & James on behalf of stockholders of the Houston & Texas Central Railway Company, and for the benefit of the plaintiffs in those cases and other stockholders similarly situated.

Q. From the time of the beginning of the litigations to which your attention has been called, down to the present time, have you had any other attorney than Dittenhoefer & Gerber, or Dittenhoefer, Gerber & James representing you, so far as your stock interest was concerned in the Houston, Texas, Central Railway Company?

Mr. Freedman: Objected to as incompetent, irrelevant and immaterial.

A. No.

Re-cross Examination by Mr. Freedman:

I spoke to Mr. Dittenhoefer very often about this litigation. I kept in touch with these litigations from time to time; sometimes I did not see Mr. Dittenhoefer in a year. I knew they were going on, the litigations. I don't know the name of it. I don't know the name of any suit that was going on. They were trying to recover the stock, the stock of the Houston & Texas. They tried to recover their right; that is all I know about it. I never read any paper in the case. I only know they brought suit in order to recover their stock of the Houston & Texas. As to giving the full name of the company, I only know the name Houston & Texas Central Railway Company. I think that was the company in which I had bought stock. I will look at it and tell you the exact name. Regarding anything that

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Michael Gernsheim—Re-Cross Examination.

was told me, or anything I did to keep in touch with these litigations, I was only told I can intervene because the suit was brought for all stockholders alike, and when that party telephoned to me what I intended to do with my stock, then I came down to Dittenhoefer and asked how is it about that stock, and he told me, "You can intervene now," and that is the reason I intervened. If I look it up I can tell you the name of the person who telephoned me. I did not go to some other attorney to intervene, I never saw nobody else. I

1329

left it in the hands of Mr. Dittenhoefer. As to whether I ever employed Mr. George Gordon Battle to do any legal work for me, I don't know if somebody else used him for me; I don't know; I myself did not do it. As to whether I asked anybody to retain any other lawyer for me. I told Mr. Dittenhoefer that I wanted to intervene. What he did in the matter I don't know. I have told you all I know now of the way I kept in touch with these litigations. As to what I know of the nature of the claims in this litigation, the various litigations I say I kept in touch with, I did not keep in touch with them. I only learned lately before I inter-

1330

vened what the result might be. They never told me the claim that the person who brought the suit was making in the suit. I never knew what the claim was. I only found that out since the time when I wanted to intervene. The fact is, I only read it this morning, didn't I?

Mr. Phelps: You have asked me a good many times, but I never gave it to you.

The Witness: Yes, I read it this morning.

Mr. Phelps: You came down to the office on the average once in every two months, since I have been there, at least.

The Witness: Once in six months.

Re-direct Examination by Mr. Gerber:

I do not know the name that was taken for the reorganized company of the Houston & Texas Central Railway Company, its new name. I do not know the name of the reorganized company. I don't know whether it has the same name or not.

Q. And when you speak of getting back your stock, you mean the stock of the reorganized company, do you not?

Mr. Freedman: I object to that as calling for a conclusion of the witness and leading.

1232

Mr. Gerber: Well, I asked if he does.

Mr. Freedman: It is leading.

Mr. Gerber: I can lead on redirect.

Mr. Freedman: Also as tending to impeach your own witness and not competent.

Q. I will ask the question again: when you speak of wanting to get back the stock to which you claim to be entitled, do you refer to the stock in the reorganized company?

Mr. Freedman: That I object to on the same ground.

1233

A. Of the reorganized company.

Mr. Freedman: I move to strike out the answer as the conclusion of the witness and as incompetent.

In connection with whatever rights I had or have in the Houston & Texas Central Railway Company, or the Houston & Texas Central Railroad Company, or against the Southern Pacific Company, I left all those matters in the hands of my attorney, Judge Dittenhoefer. I did not inquire or

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Michael Gernsheim—Re-Direct Examination.

find out at all the nature of the legal form which he followed to protect my rights. I have known for six months; maybe that H. Snowden Marshall is one of the counsel for the complainants associated with Dittenhoefer, Gerber & James as to whether I know that George Gordon Battle is associated with Russell H. Landale, I know Landale. I know Landale was one of the counsel in this case, but I had not seen Landale in a long time.

1235

It is stipulated that the summons and complaint in the first suit brought by Michael Gernsheim was verified September 26, 1889; that the decision reported in 7 New York Supplement 872, is the decision of Judge Patterson on the motion for a preliminary injunction in that suit; that the decision reported in 10 New York Supplement 483, is the decision of the General Term on the appeal from a portion of the order entered on Judge Patterson's decision, and that Exhibit C herein is the record on that appeal; that Exhibit D in evidence herein is the record on appeal from the order denying the motion for an injunction in the second Gernsheim suit, and that the order there appealed from was affirmed in October, 1891, and the decision reported in 16 New York Supplement 127, and that the said case was never brought to trial on the merits.

1236

Mr. Gerber: While we have no objection to the stipulation, I object to the evidence as being wholly immaterial, irrelevant and incompetent in this proceeding or this hearing, and as having no bearing or relevancy upon the issues involved, without, however, objecting on the ground that the original records are not produced.

Complainants rest.

Hearing closed.

Complainants' Exhibit 14 on Reference Before Special Master. 1237

(NOTE.—This exhibit is a Trust Mortgage and Guaranty Agreement from the Central Pacific Railway Company and the Southern Pacific Company to the United States Trust Company of New York, as trustee, referred to in the testimony as the "French Loan," and is not here printed, for the reason that under the order printed at pages 477 and 488 of this record, the same is to be handed up on the argument of this cause.)

Complainants' Exhibit 15 on Reference Before Special Master. 1238

(NOTE.—This exhibit is a duplicate of the minority stockholders' deposit agreement, the same being Complainants' Exhibit 4 on the trial of the trial of separate defenses, save that this exhibit bears only the signature of William J. A. Granitch and gives the numbers of shares deposited by him as 200, and is not printed here for the reason that said Exhibit 4 is printed at pages 188 to 192 of this record.)

Complainants' Exhibit ¹⁶15 on Reference Before Special Master. 1239

Received New York, April 4th 1893 from R. B. Whittemore, Henry Fitch & A. S. McLellan the Committee of the Minority Stockholders of the Houston & Texas Cent R R Co. One hundred shares of Houston & Texas Central Railway Co. (old stock) being in two certificates of fifty shares each numbered 10880 and 10881 respectively—the assessment paid on this stock to the Committee, we hereby waive all claims to.

Lathrop Smith & Oliphant.

Defendant's Exhibit A for Identification on Reference Before Special Master.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY.
INCOME AND CORPORATE SURPLUS BY YEARS, 1907 TO 1915, INCLUSIVE.

	1907	1908	1909	1910	1911	1912	1913	1914	1915
INCOME									
Railway operating income.....	\$2,093,518.21	\$1,135,667.40	\$1,285,132.61	\$1,302,705.46	\$1,369,577.44	\$660,333.57	\$1,102,820.73	\$667,747.93	\$1,053,272.25
Other income	3,427.57	44,238.67	41,409.85	96,198.31	122,870.50	139,662.46	86,125.09	62,732.89	445,594.52
Total	\$2,096,945.78	\$1,179,906.07	\$1,326,542.46	\$1,398,903.77	\$1,492,447.94	\$799,996.03	\$1,188,945.82	\$730,480.82	\$1,498,866.77
Interest on funded debt.....	\$693,920.00	\$641,760.00	\$591,060.00	\$542,550.00	\$509,122.17	\$641,595.00	\$634,430.00	\$629,560.00	\$616,512.49
Other deductions	70,352.74	190,246.13	180,171.71	204,625.44	271,940.78	350,222.44	531,442.16	536,124.62	712,861.01
Total	\$764,272.74	\$832,006.13	\$771,231.71	\$747,175.44	\$781,062.95	\$991,817.44	\$1,165,872.16	\$1,165,684.62	\$1,329,373.50
Net income (or loss).....	\$1,332,673.04	\$347,899.94	\$555,310.75	\$651,728.33	\$711,384.99	*\$191,821.41	\$23,073.66	*\$435,203.80	\$169,493.27
CORPORATE SURPLUS									
CREDITS:									
Credit balance June 30 (previous year).....	\$10,204,246.11	\$12,623,969.15	\$14,979,109.45	\$16,406,216.68	\$17,848,809.49	\$17,116,838.11	\$17,166,566.81	\$17,096,915.66	\$15,761,534.30
Credit balance transferred from income.....	1,332,673.04	347,899.94	555,310.75	651,728.33	711,384.99	—	23,073.66	—	169,493.27
Unrefundable overcharges	—	—	—	—	—	—	—	—	550.47
Donations	—	—	—	—	—	—	—	—	7,011.15
Proceeds from sale of lands pledged for redemption of bonds	1,087,000.00	922,000.00	869,000.00	800,000.00	556,000.00	229,000.00	140,000.00	486,199.27	—
Additions, betterments and equipment (1895-1901, in- clusive)	—	1,086,679.34	—	—	—	—	—	—	—
Miscellaneous credits	50.00	88.50	5,385.04	5,597.46	3,661.18	6,585.75	71,453.99	3,510.77	444,441.75
Debit balance June 30.....	—	—	—	—	—	—	—	—	—
Total	\$12,623,969.15	\$14,980,636.93	\$16,408,805.24	\$17,863,542.47	\$19,119,855.66	\$17,352,419.86	\$17,401,094.46	\$17,586,625.70	\$16,383,030.94
DEBITS:									
Debit balance transferred from income.....	—	—	—	—	—	\$191,821.41	—	\$435,203.80	—
Surplus applied to sinking and other reserve funds.,	—	—	—	—	—	—	—	—	\$165,015.00
Dividend appropriations of surplus.....	—	—	—	—	\$2,000,000.00	—	\$300,000.00	—	—
Loss on retired road and equipment.....	—	—	—	\$11,584.43	1,514.32	†6,539.68	3,376.61	15,084.05	74,032.57
Delayed income debits.....	—	—	—	—	—	—	—	—	91.69
Depreciation accrued to June 30, 1913, on rolling stock in service on that date.....	—	—	—	—	—	—	—	1,365,696.54	—
Miscellaneous debits	—	1,527.48	2,588.56	3,148.55	1,507.23	571.32	802.19	9,107.01	17,556.02
Credit balance June 30.....	12,623,969.15	14,979,109.45	16,406,216.68	17,848,809.49	17,116,834.11	17,166,566.81	17,096,915.66	15,761,534.30	16,126,335.66
Total	\$12,623,969.15	\$14,980,636.93	\$16,408,805.24	\$17,863,542.47	\$19,119,855.66	\$17,352,419.86	\$17,401,094.46	\$17,586,625.70	\$16,383,030.94

*Loss. †Gain.

Defendant's Exhibit B for Identification on Reference Before Special Master.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY.

INCOME AND CORPORATE SURPLUS BY YEARS, 1907 TO 1915, INCLUSIVE.

INCOME	1907	1908	1909	1910	1911	1912	1913	1914	1915
Railway operating Income.....	\$2,510,092.97	\$1,650,869.67	\$2,539,398.19	\$2,659,113.49	\$2,783,999.87	\$1,796,747.66	\$2,080,269.05	\$1,496,485.11	\$1,453,907.41
Other income	34,398.27	98,625.91	112,629.17	176,778.76	151,455.82	266,822.87	308,698.67	320,726.83	884,700.32
Total	\$2,544,491.24	\$1,749,495.58	\$2,652,027.36	\$2,835,892.25	\$2,935,455.69	\$2,063,570.53	\$2,388,967.72	\$1,817,211.94	\$2,338,607.73
Interest on funded debt.....	\$1,373,240.00	\$1,373,240.00	\$1,373,240.00	\$1,373,240.00	\$1,401,536.67	\$1,612,225.00	\$1,649,380.00	\$1,649,380.00	\$1,712,855.00
Other deductions	621,020.57	1,092,491.86	806,741.92	754,152.31	871,637.67	1,012,500.58	1,446,481.17	1,354,435.56	2,150,584.15
Total	\$1,994,260.57	\$2,465,731.86	\$2,179,981.92	\$2,127,392.31	\$2,273,174.34	\$2,624,725.58	\$3,095,861.17	\$3,003,815.56	\$3,863,439.15
Net income (or loss).....	\$550,230.67	*\$716,236.28	\$472,045.44	\$708,499.94	\$662,281.35	*\$561,155.05	*\$706,893.45	*\$1,186,603.62	*\$1,524,831.42
CORPORATE SURPLUS									
CREDITS:									
Credit balance June 30 (previous year).....	—	—	—	—	—	\$1,684,114.97	\$1,406,225.82	\$1,014,852.76	—
Credit balance transferred from income.....	\$550,230.67	—	\$472,045.44	\$708,499.94	\$662,281.35	—	—	—	—
Profit on road and equipment sold.....	—	—	—	—	—	—	—	—	\$152.50
Unrefundable overcharges	—	—	—	—	—	—	—	—	1,057.53
Donations	—	—	—	—	—	—	—	—	2,175.80
Additions, betterments and equipment 1895 to 1901, inclusive	—	\$1,733,894.03	—	—	—	—	—	—	—
Face value M. & P. Ext. Second Mortgage 6% bonds surrendered by company for cancellation.....	—	—	—	—	—	—	—	—	3,177,000.00
Difference between cost and face value of bonds pur- chased and retired.....	—	—	—	—	955,360.00	—	—	—	—
Miscellaneous credits	3,973.65	622.43	1,133.13	82,746.80	143,399.22	288,407.11	329,963.19	335,352.60	476,217.91
Debit balance June 30.....	2,299,112.35	1,289,301.87	817,511.43	39,714.12	—	—	—	2,796,698.69	743,593.55
Total	\$2,853,316.67	\$3,023,818.33	\$1,290,690.00	\$830,960.86	\$1,761,040.57	\$1,972,522.08	\$1,736,189.01	\$4,146,904.05	\$4,400,197.29
DEBITS:									
Debit balance June 30 (previous year).....	\$2,850,393.22	\$2,299,112.35	\$1,289,301.87	\$817,511.43	\$39,714.12	—	—	—	\$2,796,698.69
Debit balance transferred from income.....	—	716,236.28	—	—	—	\$561,155.05	\$706,893.45	\$1,186,603.62	1,524,831.42
Loss on retired road and equipment.....	—	—	—	10,120.47	24,362.85	4,902.34	7,746.78	9,035.28	62,805.74
Depreciation accrued to June 30, 1913, on rolling stock in service on that date.....	—	—	—	—	—	—	—	2,938,544.58	—
Miscellaneous debits	2,923.45	8,469.70	1,388.13	3,328.96	12,848.63	238.87	6,696.02	12,720.57	15,861.44
Credit balance June 30.....	—	—	—	—	1,684,114.97	1,406,225.82	1,014,852.76	—	—
Total	\$2,853,316.67	\$3,023,818.33	\$1,290,690.00	\$830,960.86	\$1,761,040.57	\$1,972,522.08	\$1,736,189.01	\$4,146,904.05	\$4,400,197.29

*Loss.

Defendant's Exhibit C for Identification on Reference Before Special Master.

HOUSTON, EAST & WEST TEXAS RAILWAY COMPANY.
INCOME AND CORPORATE SURPLUS BY YEARS, 1907 TO 1915, INCLUSIVE.

	1907	1908	1909	1910	1911	1912	1913	1914	1915
INCOME									
Railway operating income.....	\$508,273.69	\$257,067.87	\$388,745.05	\$400,055.97	\$432,866.55	\$312,207.34	\$300,956.19	\$324,666.83	\$249,796.32
Other income	21,375.45	44,161.44	16,428.12	28,852.06	30,089.40	30,633.64	10,943.42	15,401.24	61,422.60
Total	\$529,649.14	\$301,229.31	\$405,173.17	\$428,908.03	\$462,955.95	\$342,840.98	\$311,899.61	\$340,068.07	\$311,218.92
Interest on funded debt.....	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00	\$150,000.00
Other deductions	27,173.13	69,828.98	39,847.70	71,799.97	71,469.05	102,611.87	132,189.87	132,034.83	127,138.90
Total	\$177,173.13	\$219,828.98	\$189,847.70	\$221,799.97	\$221,469.05	\$252,611.87	\$282,189.87	\$282,034.83	\$277,138.90
Net income.....	\$352,476.01	\$81,400.33	\$215,325.47	\$207,108.06	\$241,486.90	\$90,229.11	\$29,709.74	\$58,033.24	\$34,080.02
CORPORATE SURPLUS									
CREDITS:									
Credit balance June 30 (previous year).....	\$620,036.20	\$972,512.21	\$538,855.64	\$754,384.52	\$760,615.35	\$989,541.17	\$868,188.65	\$819,639.46	\$688,078.76
Credit balance transferred from income.....	352,476.01	81,400.33	215,325.47	207,108.06	241,486.90	90,229.11	29,709.74	58,033.24	34,080.02
Unrefundable overcharges	—	—	—	—	—	—	—	—	139.98
Donation	—	—	—	—	—	—	—	—	1,659.95
Additions, betterments and equipment, 1895 to 1901, inclusive	—	61,911.31	—	—	—	—	—	—	—
Miscellaneous credits	—	—	266.32	1,496.85	1,275.53	546.21	772.68	1,837.15	5,874.70
Debit balance June 30.....	—	—	—	—	—	—	—	—	—
Total	\$972,512.21	\$1,115,823.85	\$754,447.43	\$962,989.43	\$1,003,377.78	\$1,080,316.49	\$898,671.07	\$879,509.85	\$729,833.41
DEBITS:									
Dividend appropriation of surplus.....	—	\$576,000.00	—	\$192,000.00	—	\$211,200.00	\$76,800.00	—	—
Loss on retired road and equipment.....	—	—	—	2,909.78	\$13,355.63	882.28	1,092.84	\$289.13	\$2,934.72
Delayed income debits.....	—	—	—	—	—	—	—	—	7,081.90
Depreciation accrued to June 30, 1913, on rolling stock in service on that date.....	—	—	—	—	—	—	—	190,815.51	—
Miscellaneous debits	—	968.21	\$62.91	7,464.30	480.98	45.56	1,138.77	326.45	805.27
Credit balance June 30.....	\$972,512.21	538,855.64	754,384.52	760,615.35	989,541.17	868,188.65	819,639.46	688,078.76	719,011.52
Total	\$972,512.21	\$1,115,823.85	\$754,447.43	\$962,989.43	\$1,003,377.78	\$1,080,316.49	\$898,671.07	\$879,509.85	\$729,833.41

	1907	1908	1909	1910	1911	1912	1913	1914	1915
INCOME									
Railway operating income.....	\$1,158,499.20	\$997,156.33	\$1,229,039.06	\$1,382,062.31	\$1,344,116.08	\$962,899.75	\$495,719.65	\$800,889.51	\$708,858.12
Other income	156,196.57	188,600.90	43,012.00	50,758.90	66,742.97	34,350.76	36,988.10	64,167.51	268,286.74
Total	\$1,314,695.77	\$1,185,757.23	\$1,272,051.06	\$1,432,821.21	\$1,410,859.05	\$997,250.51	\$532,707.75	\$865,057.02	\$977,144.86
Interest on funded debt.....	\$489,640.00	\$489,640.00	\$489,640.00	\$489,640.00	\$488,548.39	\$485,090.00	\$485,090.00	\$435,090.00	\$435,090.00
Other deductions	1,572,096.67	12,849.86	26,218.83	63,539.41	153,648.73	258,024.94	153,829.47	253,545.74	419,252.27
Total	\$2,061,736.67	\$502,489.86	\$515,858.83	\$553,179.41	\$642,197.12	\$743,114.94	\$638,919.47	\$688,635.74	\$854,342.27
Net income (or loss).....	*\$747,040.90	\$683,267.37	\$756,192.23	\$879,641.80	\$768,661.93	\$254,135.57	*\$106,211.72	\$176,421.28	\$122,802.59
CORPORATE SURPLUS									
CREDITS:									
Credit balance June 30th (previous year).....	\$6,406,178.54	\$5,564,667.53	\$2,504,817.08	\$2,648,515.32	\$2,768,843.03	\$3,028,007.27	\$6,202,454.79	\$6,128,888.66	\$4,784,111.91
Credit balance transferred from income.....	—	683,267.37	756,192.23	879,641.80	768,661.93	254,135.57	—	176,421.28	122,802.59
Unrefundable overcharges	—	—	—	—	—	—	—	—	365.99
Donations	—	—	—	—	—	—	—	—	1,675.00
Miscellaneous credits	1,483.82	9,207.78	—	2,358.61	419,589.33	169,820.25	45,655.47	101,110.48	49,137.31
Additions and betterments charged to income in former years	—	—	—	—	—	3,367,775.38	—	—	—
Debit balance June 30th.....	—	—	—	—	—	—	—	—	—
Total	\$6,407,662.36	\$6,257,142.68	\$3,261,009.31	\$3,530,515.73	\$3,957,094.29	\$6,819,738.47	\$6,248,110.26	\$6,406,420.42	\$4,958,092.80
DEBITS:									
Debit balance transferred from income.....	\$747,040.90	—	—	—	—	—	\$106,211.72	—	—
Dividend and appropriation of surplus.....	—	\$3,750,000.00	\$600,000.00	\$750,000.00	\$900,009.00	\$600,000.00	—	—	—
Loss on retired road and equipment.....	—	—	—	8,061.99	14,384.55	7,229.83	1,571.17	\$13,721.18	\$38,605.96
Miscellaneous debits	95,953.93	2,325.60	12,493.99	3,610.71	14,702.47	10,053.85	11,438.71	12,020.76	2,880.62
Depreciation accrued to June 30th, 1913, on rolling stock in service on that date.....	—	—	—	—	—	—	—	1,596,566.57	—
Credit balance June 30th.....	5,564,667.53	2,504,817.08	2,648,515.32	2,768,843.03	3,028,007.27	6,202,454.79	6,128,888.66	4,784,111.91	4,916,606.22
Total	\$6,407,662.36	\$6,257,142.68	\$3,261,009.31	\$3,530,515.73	\$3,957,094.29	\$6,819,738.47	\$6,248,110.26	\$6,406,420.42	\$4,958,092.80
*Loss.									

Defendant's Exhibit E for Identification on Reference Before Special Master.

OREGON & CALIFORNIA RAILROAD COMPANY.
INCOME AND CORPORATE SURPLUS BY YEARS, 1907 TO 1915, INCLUSIVE.

[illegible]

Defendant's Exhibit F for Identification on Reference Before Special Master.

SOUTHERN PACIFIC RAILROAD COMPANY

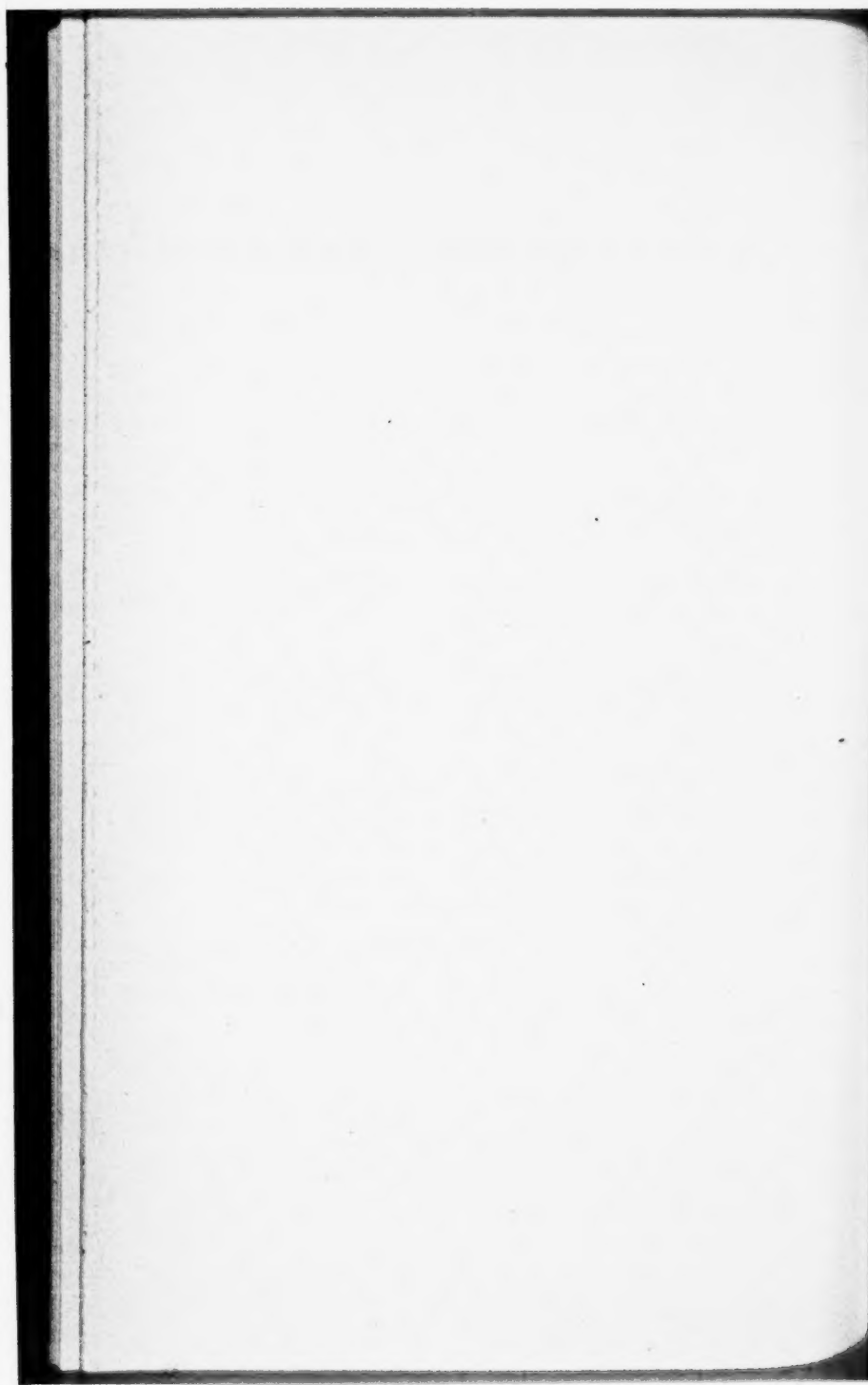
	1907	1908	1909	1910	1911	1912	1913	1914	1915
INCOME									
Railway operating income.....				None—Road leased to Southern Pacific Company					
Other income	\$18,982,315.05	\$16,954,049.12	\$18,561,866.49	\$22,609,185.54	\$20,379,986.40	\$21,416,819.96	\$20,542,061.64	\$20,842,911.17	\$14,331,642.51
Total	\$18,982,315.05	\$16,954,049.12	\$18,561,866.49	\$22,609,185.54	\$20,379,986.40	\$21,416,819.96	\$20,542,061.64	\$20,842,911.17	\$14,331,642.51
Interest on funded debt.....	\$5,637,165.42	\$5,579,134.80	\$5,896,757.76	\$6,036,236.67	\$6,066,932.28	\$6,157,754.44	\$6,202,074.57	\$6,201,669.89	\$6,334,355.51
Other deductions	9,416,493.16	2,921,973.05	2,844,703.24	2,966,250.89	3,443,226.45	3,690,118.04	1,521,393.68	3,717,549.05	349,469.91
Total	\$15,053,658.58	\$8,501,107.85	\$8,741,461.00	\$9,002,487.56	\$9,510,158.73	\$9,847,872.48	\$7,723,468.25	\$9,919,218.94	\$6,683,825.42
Net income (or loss).....	\$3,928,656.47	\$8,452,941.27	\$9,820,405.49	\$13,606,697.98	\$10,869,827.67	\$11,568,947.48	\$12,818,593.39	\$10,923,692.23	\$7,647,817.09
CORPORATE SURPLUS									
CREDITS:									
Credit balance June 30th (previous year).....	\$24,483,416.85	\$27,831,316.75	\$15,899,643.78	\$17,501,675.62	\$19,792,167.08	\$21,521,126.34	\$25,335,298.30	\$28,569,715.99	\$28,563,813.77
Credit balance transferred from income.....	3,928,656.47	8,452,941.27	9,820,405.49	13,606,697.98	10,869,827.67	11,568,947.48	12,818,593.39	10,923,692.23	7,647,817.09
Profit on road and equipment sold.....	—	—	—	—	—	—	—	—	166.49
Adjustment in leasehold operations, years 1905 and 1906	—	—	2,051,715.62	—	—	—	—	—	—
Miscellaneous credits	407,543.55	424,514.80	453,380.20	259,840.67	381,043.82	250,134.41	169,485.92	785,798.53	178,946.51
Proceeds from sale of lands pledged for redemption of bonds	38,880.38	13,741.59	21,741.81	166,242.83	176,678.80	4,462,699.19	—	—	—
Proceeds from sale of unpledged lands.....	—	—	—	—	—	—	—	2,301,500.00	—
Debit balance June 30th.....	—	—	—	—	—	—	—	—	—
Total	\$28,858,497.25	\$36,722,514.41	\$28,246,886.90	\$31,534,457.10	\$31,219,717.37	\$37,802,908.02	\$38,323,377.61	\$42,580,706.75	\$36,390,743.86
DEBITS:									
Dividend appropriation of surplus.....	—	\$20,800,000.00	\$8,000,000.00	\$9,600,000.00	\$9,600,000.00	\$9,600,000.00	\$9,600,000.00	\$9,600,000.00	\$8,000,000.00
Debt discount extinguished through surplus.....	—	—	—	—	—	—	—	—	630,610.08
Loss on retired road and equipment.....	—	21,764.98	—	21,394.59	98,591.03	83,849.72	59,421.62	27,970.91	*1,131.65
Delayed income debits.....	—	—	—	—	—	—	—	—	60,577.81
Miscellaneous debits	\$2,180.50	1,105.65	254,576.28	14,624.68	—	283,760.00	94,240.00	26,080.93	7,792.01
Depreciation accrued to June 30, 1913, on rolling stock in service on that date.....	—	—	—	—	—	—	—	8,187,038.97	—
Fund for refunding outstanding old bonds of S. P. R. R. Co.....	1,025,000.00	—	1,500,000.00	1,992,000.00	—	2,500,000.00	—	*3,824,197.83	—
Discount on bonds issued during the year.....	—	—	990,635.00	114,270.75	—	—	—	—	—
Credit balance June 30th.....	27,831,316.75	15,899,643.78	17,501,675.62	19,792,167.08	21,521,126.34	25,335,298.30	28,569,715.99	28,563,813.77	27,692,895.61
Total	\$28,858,497.25	\$36,722,514.41	\$28,246,886.90	\$31,534,457.10	\$31,219,717.37	\$37,802,908.02	\$38,323,377.61	\$42,580,706.75	\$36,390,743.86

*Gain.

Defendant's Exhibit G for Identification on Reference Before Special Master.

SOUTHERN PACIFIC TERMINAL COMPANY
INCOME AND CORPORATE SURPLUS BY YEARS, 1907 TO 1915, INCLUSIVE

	1907	1908	1909	1910	1911	1912	1913	1914	1915
INCOME									
Railway operating income.....	\$217,349.10	\$157,835.48	\$154,016.02	\$147,571.60	\$113,921.24	\$120,511.84	\$237,691.60	\$184,681.51	\$152,070.34
Other income	14,202.51	6,182.19	80.38	4,191.59	4,757.30	5,000.80	3,263.71	1,158.53	61,530.94
Total	\$231,551.61	\$164,017.67	\$154,096.40	\$151,763.19	\$118,678.54	\$125,512.64	\$240,955.31	\$185,840.04	\$213,601.28
Interest on funded debt.....	—	—	—	—	—	—	—	—	—
Other deductions	\$240,000.00	—	\$2,761.70	\$1,379.82	—	\$31.84	\$2,131.28	\$7,070.58	\$8,542.44
Total	\$240,000.00	—	\$2,761.70	\$1,379.82	—	\$31.84	\$2,131.28	\$7,070.58	\$8,542.44
Net income (or loss).....	*\$8,448.39	\$164,017.67	\$151,334.70	\$150,383.37	\$118,678.54	\$125,480.80	\$238,824.03	\$178,769.46	\$205,058.84
CORPORATE SURPLUS									
CREDITS :									
Credit balance June 30th (previous year).....	\$329,281.45	\$320,833.06	\$124,948.23	\$156,282.93	\$186,694.47	\$185,288.23	\$190,586.47	\$272,449.23	\$329,635.89
Credit balance transferred from income.....	—	164,017.67	151,334.70	150,383.37	118,678.54	125,480.80	238,824.03	178,769.46	205,058.84
Donations	—	—	—	—	—	—	—	—	1,870.78
Miscellaneous credits	—	97.50	—	28.17	4.45	—	—	4.64	50,482.05
Debit balance June 30th.....	—	—	—	—	—	—	—	—	—
Total	\$329,281.45	\$484,948.23	\$276,282.93	\$306,694.47	\$305,377.46	\$310,769.03	\$429,410.50	\$451,223.33	\$587,047.56
DEBITS :									
Debit balance transferred from income.....	\$8,448.39	—	—	—	—	—	—	—	—
Dividend appropriation of surplus.....	—	\$360,000.00	\$120,000.00	\$120,000.00	\$120,000.00	\$120,000.00	\$120,000.00	\$120,000.00	\$200,000.00
Loss on retired road and equipment.....	—	—	—	—	—	70.00	36,956.90	—	—
Miscellaneous debits	—	—	—	—	89.23	112.56	4.37	1,587.44	1,155.03
Credit balance June 30th.....	320,833.06	124,948.23	156,282.93	186,694.47	185,288.23	190,586.47	272,449.23	329,635.89	385,892.53
Total	\$329,281.45	\$484,948.23	\$276,282.93	\$306,694.47	\$305,377.46	\$310,769.03	\$429,410.50	\$451,223.33	\$587,047.56
*Loss.									



Report of Special Master.

1285

(Filed July 29, 1916.)

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

1286

I, Joseph G. Cochran, heretofore appointed Special Master by the interlocutory decree, dated December 13, 1915, do pursuant to said decree report as follows:

That testimony was taken as directed, and that from said testimony and the record in the case, I find:

FIRST.—The number of shares of the capital stock of the Houston & Texas Central Railway Company owned and possessed by R. B. Whittemore, Henry Fitch, and Russell H. Landale, as trustees of stockholders of the Houston & Texas Central Railway Company, or otherwise to be 17,776. 1287.

SECOND.—The proportionate amount of common stock of the Houston & Texas Central Railroad Company, held and possessed by the Southern Pacific Company for the benefit of the said R. B. Whittemore, Henry Fitch, and Russell H. Landale, as trustees as aforesaid, on the basis set forth in the interlocutory decree, to be 23,002,114 shares.

1288

THIRD.—The amount of dividends, and the dates when received by the defendant, Southern Pacific Company upon the common stock of the Houston & Texas Central Railroad Company, to which under the decree the complainants and the said R. B. Whittemore, Henry Fitch, and Russell H. Landale, as trustees are entitled, are as follows:

March 30, 1903,	\$6.00	a share	=	\$138,012.86
June 30, 1911,	20.00	" "	=	460,042.88
June 18, 1913,	3.00	" "	=	69,006.43

1289

FOURTH.—That the facts concerning the pledge of the Houston & Texas Central Railroad Company stock under the European loan, are contained in the mortgage agreement, dated March 1, 1911, marked Exhibit 14, and are as follows:

On March 1, 1911, the defendant, Southern Pacific Company, and the Central Pacific Railway Company, jointly made a thirty-five year European loan for fifty million dollars, at four per cent. with the United States Trust Company of New York as trustee.

1290

Among the stock and bonds deposited by the Southern Pacific Company with the trustee as security for the loan, are 99,983 shares of the Houston & Texas Central Railroad Company, common stock, which is the total number of shares outstanding and in the possession of the Southern Pacific Company, except the seventeen directors qualifying shares (Exhibit 14, page 22).

In said mortgage agreement, the agreed value of this stock was \$50.00 a share (and no reappraisal has since been made).

Under the terms of this indenture, the Southern Pacific Company has the right to withdraw all of

this stock of the Houston & Texas Central Railroad Company; and to substitute therefor other securities of no less appraised value than the last previous appraised value of the stock withdrawn, which is \$50.00 a share (Exhibit 14, page 23).

As to the petitions of Sara Rosenfeld, and Michael Gernsheim, I report that testimony as to the allegations set forth therein, has been taken, and that from a consideration of said testimony, I find that the allegations set forth in said petitions, are true, and that therefore the petitioner Sara Rosenfeld, and Rosetta Cohn, as executrices under the last will and testament of Charles Minzesheimer are now in possession of 200 shares of the Houston & Texas Central Railway Company stock (and that said stock was owned by said Charles Minzesheimer, at the time of the acts complained of in the complaint herein); and that the petitioner Michael Gernsheim is now in possession of 740 shares of the Houston & Texas Central Railway Company stock, and was the owner of said stock at the time of the acts complained of in the complaint herein.

1292

That the proportionate amount of common stock of the Houston & Texas Central Railroad Company held and possessed by the Southern Pacific Company for the benefit of said parties is as follows: for Sara Rosenfeld and Rosetta Cohn as executrices under the last will and testament of Charles Minzesheimer 258.8 shares, and for the petitioner Michael Gernsheim, 957.56 shares.

1293

That each of said petitioners is entitled to the same benefits as the other plaintiffs, and the amount of dividends, and the dates when received by the defendant Southern Pacific Company upon the said stock of the Houston & Texas Central Railroad Company to which under the decree said petitioners are respectively entitled, are as follows:

1294

Report of Special Master.

March 30, 1903, \$6 per share Sara Rosen-	
feld	\$1,552.80
Michael Gernsheim	5,745.36
June 30, 1911, \$20 per share Sara Rosen-	
feld	5,176.00
Michael Gernsheim	19,151.20
June 18, 1913, \$3 per share Sara Rosen-	
feld	776.40
Michael Gernsheim	2,872.68

1295

I find that the defendants allegations in its answer to the petition of Michael Gernsheim, that said petitioner was one of the plaintiffs in the so-called Gernsheim suits in the New York State Courts against the Central Trust Company, the records of which suits are in evidence herein, are true.

July 29, 1916.

Respectfully submitted,

JOSEPH G. COCHRAN,
Special Master.

1296

**Defendant's Exceptions to Report of 1297
Special Master.**

(Filed Aug. 29, 1916.)

IN THE DISTRICT COURT OF THE UNITED
STATES,

EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

1298

The defendant above named hereby files the following exceptions to the Report of Joseph G. Cochran, Special Master, filed the 29th day of July, 1916, in the following particulars:

FIRST.—The defendant excepts to each and every portion of said report which finds or purports to find that the Southern Pacific Company holds for the benefit of R. B. Whittemore, Henry Fitch and Russell H. Landale, as Trustees, or for any other person or persons, any common stock of the Houston & Texas Central Railroad Company.

1299

SECOND.—The defendant excepts to each and every portion of said report which finds or purports to find that the said R. B. Whittemore, Henry Fitch and Russell H. Landale, as Trustees, or any other person or persons are entitled to any dividends up-

1300 *Defendant's Exceptions to Report of Special Master.*

on the common stock of the Houston & Texas Central Railroad Company.

1301 **THIRD.**—The defendant excepts to each and every portion of said report which finds or purports to find the facts concerning the pledge of the Houston & Texas Central Railroad Company stock under the European Loan, and particularly the finding that no re-appraisal of the common stock of the Houston & Texas Central Railroad Company has been made since said stock was pledged under said loan, and particularly to the finding of fact referring to the withdrawal of the Houston & Texas Central Railroad Company stock and the substitution therefor of other securities under said loan, the facts as found being incomplete and not setting forth the rights, duties and obligations of the defendant Southern Pacific Company under and pursuant to the terms of a mortgage agreement dated March 1, 1911.

1302 **FOURTH.**—The defendant excepts to that portion of the report which finds or purports to find that the stock in the possession of Sara Rosenfeld and Rosetta Cohn as Executrices under the last Will and Testament of Charles Minzesheimer was owned by the said Charles Minzesheimer at the time of the acts complained of in the complaint, and to that further portion of the report which finds or purports to find that the defendant Southern Pacific Company holds any common stock of the Houston & Texas Central Railroad Company for the benefit of said Sara Rosenfeld and Rosetta Cohn as Executrices under the last Will and Testament of Charles Minzesheimer, deceased, or for the benefit of Michael Gernsheim, and to that further

Defendant's Exceptions to Report of Special Master.

1303

portion of the report which finds or purports to find that the Southern Pacific Company has received for the benefit of said Executrices or said Michael Gernsheim, any dividends on the stock of the Houston & Texas Central Railroad Company to which said Executrices, or said Michael Gernsheim, are entitled.

FIFTH.—The defendant excepts to the report of the Special Master in that said Special Master has refused to charge the complainants or the said R. B. Whittemore, Henry Fitch and Russell H. Landale, as Trustees of stockholders of the Houston & Texas Central Railway Company, or the said Sara Rosenfeld and Rosetta Cohn, as Executrices of Charles Minzesheimer, deceased, or the said Michael Gernsheim,

1304

(a) With the pro rata share of the sums or moneys paid out by the defendant Southern Pacific Company in connection with the judgments entered against the Houston & Texas Central Railway Company by the Lackawanna Iron & Coal Company; by the Morgan's Louisiana & Texas Railroad & Steamship Company and by the Southern Development Company, and with the interest which has accrued on said judgments, or with the pro rata share of the amounts of said judgments of which the defendant lost and had been deprived by reason of the reorganization of the Houston & Texas Central Railway Company.

1305

(b) With the detriment or loss suffered, and the value of obligations assumed, by reason of carrying out the provisions of the Reorganization Agreement of the Houston & Texas Central Railway Company.

1306 *Defendant's Exceptions to Report of Special Master.*

1307 SIXTH.—The defendant excepts to the report of the Special Master in that the Special Master has found that the Southern Pacific Company should turn over and deliver to the complainants and to R. B. Whittemore, Henry Fitch and Russell H. Landale as Trustees, and to Sara Rosenfeld and Rosetta Cohn, as Executrices of Charles Minzesheimer and to Michael Gernsheim, certificates of stock of the Houston & Texas Central Railroad Company and refusing to permit the defendant, in lieu of the delivery of said stock, to pay the fair market value thereof, less the amounts which should properly be credited to the defendant company in carrying out the plan of reorganization of the Houston & Texas Central Railway Company.

SEVENTH.—The defendant excepts to the report of the Special Master in that the Special Master refused and declined to permit the witness Alexander J. Hemphill to testify as to the fair market value of the Houston & Texas Central Railroad Company stock.

1308 EIGHTH.—The defendant excepts to the report of the Special Master in that the Special Master refused and declined to permit the witness Alexander J. Hemphill to testify as to the fair market value of the shares of stock pledged under the European loan.

Dated, August , 1916.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant,
54 Wall Street,
Borough of Manhattan,
New York, N. Y.

To

MESSRS. DITTENHOFFER, GERBER & JAMES,
32 Broadway,
New York, N. Y.,
Solicitors for Defendant,

Order Overruling Defendant's Ex- 1309
ceptions to Report of Special
Master.

(Filed September 15, 1916.)

At a Special Term of the United States District Court, held in and for the Eastern District of New York, in the U. S. Court House & Post Office Building, County of Kings, State of New York, on the 15th day of September, 1916.

Present—Hon. THOMAS I. CHATFIELD.

1310

HENRY L. BOGERT et al.,
 Complainants,

against

SOUTHERN PACIFIC COMPANY,
 Defendant.

The complainants having made a motion for an 1311
 order overruling the exceptions heretofore filed by
 the defendant to the report of Joseph G. Cochran,
 Special Master, and to confirm said report as filed,
 and the said motion having duly come on to be
 heard;

NOW, on reading the report of Joseph G. Cochran, Special Master, filed in the office of the Clerk of this Court on the 29th day of July, 1916, and the exceptions of the defendant to said report,

1312 *Order Overruling Defendant's Exceptions to
Report of Special Master.*

filed in the office of the Clerk of this Court on the 29th day of August, 1916, and after hearing H. Snowden Marshall, counsel for the complainants, in support of said motion and Arthur H. Van Brunt, counsel for the defendant in opposition thereto;

NOW on motion of Dittenhoefer, Gerber & James, attorneys for the complainants, it is

1313 ORDERED that the exceptions filed by the defendant to the report of Joseph G. Cochran, Special Master, be and they are hereby in all respects overruled, and that the report of said Special Master be and the same is hereby in all respects confirmed and approved.

THOMAS I. CHATFIELD,
U. S. D. J.

1314

Final Decree.**1315**

(Filed October 5, 1916.)

At a Term of the United States District Court, held in and for the Eastern District of New York, in the United States Court House, and Post Office Building, in the Borough of Brooklyn, City of New York, on the 5th day of October, 1916.

Present—Hon. THOMAS I. CHATFIELD, District Judge. **1316**

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

This cause came on to be further heard at this term and was argued by counsel; and thereupon upon consideration thereof, it was **1317**

ORDERED, ADJUDGED AND DECREED as follows: viz:

FIRST.—Each and every allegation contained in the complaint of Henry L. Bogert and others is true.

SECOND.—The defendant, Southern Pacific Company, now holds and possesses 23,002,144 shares

1318

of stock of the Houston & Texas Central Railroad Company, in trust, for the benefit of Henry Fitch and Russell H. Landale, as surviving trustees of stockholders of the Houston & Texas Central Railroad Company, and to which shares of stock said trustees are entitled to immediate possession and absolute ownership, as trustees aforesaid, upon the following terms and conditions:

1319

Upon the said trustees aforesaid surrendering to the defendant, Southern Pacific Company, 17,776 shares of the Houston & Texas Central Railway Company stock now in their possession, together with \$26.026 for each share of the Houston & Texas Central Railroad Company stock delivered to them by the defendant, Southern Pacific Company, with interest thereon at six per cent. from February 10, 1891, to date, whereupon the defendant, Southern Pacific Railway Company shall and is hereby ordered and directed to deliver to the said Henry Fitch and Russell H. Landale, as surviving trustees aforesaid, the said 23,002.144 shares of Houston & Texas Central Railroad Company stock, together with the following dividends received by the defendant, Southern Pacific Company, upon said shares of stock:

1320

\$138,012.86, with interest thereon at six per cent. from March 30, 1903;

\$460,042.88, with interest thereon at six per cent. from June 30, 1911;

\$69,006.43, with interest thereon at six per cent. from June 18, 1913.

THIRD.—The defendant, Southern Pacific Company, now holds and possesses 258.8 shares of stock of the Houston & Texas Railroad Company, for the benefit of Sara Rosenfeld and Rosetta

Cohn, as executrices under the last will and testament of Charles Minzesheimer, and to which shares of stock said executrices are entitled to immediate possession and absolute ownership as executrices aforesaid, upon the following terms and conditions:

Upon the said executrices surrendering to the defendant, Southern Pacific Company, 200 shares of the Houston & Texas Central Railway Company stock, now in their possession, together with \$26.026 for each share of the Houston & Texas Central Railroad Company stock delivered to them by the defendant, Southern Pacific Company, with interest thereon at six per cent. from February 10, 1891, to date, whereupon the defendant, Southern Pacific Company shall and is hereby ordered and directed to deliver to the said Sara Rosenfeld and Rosetta Cohn, as executrices under the last will and testament of Charles Minzesheimer, the said 258.8 shares of Houston & Texas Central Railroad Company stock, together with the following dividends received by the defendant, Southern Pacific Company, upon said shares of stock:

1322

\$1,552.80, with interest thereon at six per cent. from March 30, 1903;

\$5,176.00, with interest thereon at six per cent. from June 30, 1911;

\$776.40, with interest thereon at six per cent. from June 18, 1913.

1323

FOURTH.—The defendant, Southern Pacific Company, now holds and possesses 957.56 shares of stock of the Houston & Texas Railroad Company, for the benefit of Michael Gernsheim, and to which shares of stock said Michael Gernsheim is entitled

1324

to immediate possession and absolute ownership, upon the following terms and conditions:

1325 Upon the said Michael Gernsheim surrendering to the defendant, Southern Pacific Company, 740 shares of the Houston & Texas Central Railway Company stock now in his possession, together with \$26.026 for each share of the Houston & Texas Central Railroad Company stock delivered to him by the defendant, Southern Pacific Company, with interest thereon at six per cent. from February 10, 1891, to date, whereupon the defendant Southern Pacific Company, shall and is hereby ordered and directed to deliver to the said Michael Gernsheim the said 957.56 shares of Houston & Texas Central Railroad Company stock, together with the following dividends received by the defendant, Southern Pacific Company, upon said shares of stock:

\$5,745.36, with interest thereon at six per cent. from March 30, 1903;

\$19,151.20, with interest thereon at six per cent. from June 30, 1911;

1326 \$2,872.68, with interest thereon at six per cent. from June 18, 1913.

FIFTH.—The defendant shall perform the acts herein directed to be done and deliver the stock herein ordered to be delivered on or before the 10th day of November, 1916.

SIXTH.—The defendant shall pay to Joseph G. Cochran, Special Master, the sum of \$150 as his fee herein.

SEVENTH.—The defendant shall pay to the plaintiffs the costs in this suit taxed by the Clerk of the Court, on notice to the defendant, and plaintiffs

Defendant's Notice of Motion for Alternative Relief and a Stay. 1327

shall have execution for such costs and for the sums above decreed to be paid to said plaintiffs.

And it is ordered and decreed that application may be made at the foot of this order in this court or in any court having jurisdiction for further direction, in case alternative or other relief is at any time suggested on the part of the defendant, if physical delivery of shares of the common stock of the Houston & Texas Central Railroad Company be considered or prove to be physically or financially impossible from an equitable standpoint. 1328

THOMAS I. CHATFIELD,
U. S. D. J.

Defendant's Notice of Motion for Alternative Relief and a Stay.

(Filed November 3, 1916.)

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK. 1329

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

PLEASE TAKE NOTICE that upon the annexed affidavit of Angus D. McDonald, sworn to

1330 *Defendant's Notice of Motion for Alternative Relief and a Stay.*

- the 2nd day of November, 1916, the affidavit of Alexander J. Hemphill, sworn to the 2nd day of November, 1916, and the affidavit of Lewis H. Freedman, sworn to the 3rd day of November, 1916, we shall move this Court at a stated term thereof, to be held at the court rooms, Post Office Building, Borough of Brooklyn, City of New York, on the 8th day of November, 1916, at two o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, pursuant to the provision contained in said decree of October 5, 1916, for an order asking for alternative or other relief and relieving the defendant from making physical delivery of shares of the common stock of the Houston & Texas Central Railroad Company, staying the complainants from taking any steps or proceedings from enforcing physical delivery of said shares of stock or extending the time of the defendant to comply with said provisions of said decree or order until the 8th day of December, 1916, and for such other and further relief in the premises as to the Court may seem just and proper.
- 1331
- 1332

Dated, New York, November 3, 1916.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant,
Office and P. O. Address,
54 Wall Street,
Manhattan,
New York, N. Y.

To

MESSRS. DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainants,
96 Broadway,
Manhattan,
New York, N. Y.

Affidavits in Support of Defendant's 1333
Motion for Alternative Relief and
a Stay.

(Filed November 3, 1916.)

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
 Complainants,

against

SOUTHERN PACIFIC COMPANY,
 Defendant.

1334

State of New York, }
 County of New York, } ss.:

Angus D. McDonald, being first duly sworn, deposes and says:

I am Controller and Vice-President of the Southern Pacific Company, the defendant in the above entitled suit, and have been such for more than three years.

1335

I am familiar with the indenture, dated March 1, 1911, entered into between the Central Pacific Railway Company, Southern Pacific Company and United States Trust Company of New York as Trustee, being known as the French Loan Agreement, which was offered in evidence in this suit before Joseph G. Cochran, as Special Master, and is marked Complainants' Exhibit No. 14 January 20, 1916.

1336

Affidavit of Angus D. McDonald.

1337

To comply with the terms of the decree entered in this suit, dated October 5, 1916, would subject the defendant to the hardship of replacing not only the shares of stock of the Houston & Texas Central Railroad Company, all of which would have to be released from the terms and provisions of said trust indenture, but the defendant would in addition be compelled to put up securities to meet the depreciation in the value of the shares of stock of the Morgan's Louisiana & Texas Railroad and Steamship Company, and the seven per cent. non-cumulative preferred stock of the Oregon & California Railroad Company, the market value of which, as I am informed and believe, at the present time, is less than the appraised value of said stock as stated in said French Loan Agreement.

1338

The terms of said French Loan Agreement requiring action to be taken on behalf of the French banks and a new appraisement are such that it is impossible to make or conclude any arrangements looking towards the release of any of the securities lodged as collateral to said French loan on or before November 10th, or for some considerable period of time thereafter.

A. D. McDONALD.

Sworn to before me this
2nd day of November, 1916.

C. H. ARRINGTON,
Notary Public.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

1340

State of New York, }
County of New York, } ss.:

Alexander J. Hemphill, being first duly sworn,
deposes and says:

I am Chairman of the Board of Directors of the
Guaranty Trust Company and have filled that
position for about two years. Prior to filling that
position I was President of the Guaranty Trust
Company for about five or six years and prior to
being President I was Vice-President.

1341

I have had business experience in connection
with railroads, and I have been Secretary to the
Financial Vice-President of the Pennsylvania
Railroad Company and have been an officer of the
Norfolk & Western Railroad Company.

In connection with my duties as an officer of the
Guaranty Trust Company, I have frequently
passed upon the value of stocks of corporations,
and have had occasion to familiarize myself with
the methods generally employed in determining
the values of stocks of corporations, and have had

1342

experience in passing on loans made by the Guaranty Trust Company in connection with stocks of corporations offered as collateral.

I was called as a witness on behalf of the Southern Pacific Company upon the hearings had before Joseph G. Cochran, as Special Master, and testified on May 9, 1916, in this suit.

Prior to giving such testimony, I was furnished certain data and information relative to the following corporations:

1343

Houston & Texas Central Railroad Company, Southern Pacific Terminal Company, Morgan's Louisiana & Texas Railroad and Steamship Company, Oregon & California Railroad Company, Galveston, Harrisburg & San Antonio Railway Company, Eastern Division, and the Southern Pacific Railroad Company. All of which said data was offered in evidence and marked for identification upon the hearing had before the Special Master.

1344

From the data and information then furnished me I was able to form and did form an opinion as to the fair market value of the Houston & Texas Central Railroad Company First Mortgage bonds on the Lampasas Extension; the shares of stock of the Southern Pacific Terminal Company; the shares of stock of the Morgan's Louisiana & Texas Railroad and Steamship Company; the seven per cent. non-cumulative preferred stock of the Oregon & California Railroad Company; the shares of stock of the Houston & Texas Central Railroad Company, the Second and First Mortgage bonds of the Eastern Division of the Galveston, Harrisburg & San Antonio Railway Company and the shares of stock of the Southern Pacific Railroad Company.

At the time I gave my testimony the bonds and shares of stock above referred to had, in my opinion, the following market values:

Bonds of the Houston & Texas Central Railroad Company First Mortgage of Lampasas Extension were of the fair market value of the par of said bonds;

The stock of the Southern Pacific Terminal Company was of the fair market value of the par value thereof;

The stock of the Morgan's Louisiana & Texas Railroad and Steamship Company was of the fair market value of 30% of the par value thereof;

1346

The seven per cent. non-cumulative preferred stock of the Oregon & California Railroad Company was of the fair market value of 40% of the par value thereof;

The stock of the Houston & Texas Central Railroad Company was of the fair market value of 25 to 30 per cent. of the par value thereof;

The Second Mortgage bonds, Eastern Division of the Galveston, Harrisburg & San Antonio Railway Company, and the First Mortgage bonds of said Eastern Division of the Galveston, Harrisburg & San Antonio Railway Company were of the fair market value of the par thereof.

1347

The stock of the Southern Pacific Railroad Company was of the fair market value of the par value thereof.

ALEXANDER J. HEMPHILL.

Sworn to before me this

2nd day of November, 1916.

THOMAS F. DOUGHERTY,
Notary Public.

1348

Affidavit of Lewis H. Freedman.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

1349

State of New York, }
County of New York, } ss.:

Lewis H. Freedman, being duly sworn, deposes and says that he is a member of the firm of Joline, Larkin & Rathbone, attorneys for the defendant in the above entitled suit and is of counsel to the defendant in said suit, and is familiar with all the steps and proceedings had and taken therein.

1350

The decree entered in this suit bearing date the 5th day of October, 1916, requires that the acts by said decree directed to be performed and the delivery of the stock as therein provided, shall be done and delivered on or before the 10th day of November, 1916.

As appears from the testimony given before the Special Master, the shares of stock are pledged as collateral under the so-called French Loan Agreement. It is impossible to comply with the terms of said agreement on or before November 10th, and it will be impossible to comply with the terms of said agreement and obtain the release of the shares

of stock of the Houston & Texas Central Railroad Company for a considerable period of time after said date.

It is the present intention of the defendant in this suit to perfect an appeal from the decree entered, and the preparation of the assignments of error, which will have to be filed at the time the petition for the appeal is presented, will require considerable time and will be voluminous and involve the examination of not only the testimony, opinions, orders and decrees entered in this suit, but also the records which were offered in evidence in the Carey, Gernsheim and McArdle suits. These records are very voluminous and embrace a great many printed pages.

1352

Upon the presentation of the petition and assignments of error, the defendant proposes to ask for a supersedeas pending the hearing and determination of the appeal.

LEWIS H. FREEDMAN.

Sworn to before me this
3rd day of November, 1916.

1353

ORVILLE C. SANBORN,
Notary Public.

**1354 Affidavit in Opposition to Defendant's
Motion for Alternative Relief and
Stay.**

(Filed November 8, 1916.)

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

1355

HENRY L. BOGERT et al.,
Plaintiffs,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

State of New York,
City & County of New York, } ss.:

Dudley F. Phelps, being duly sworn, deposes and
says:

1356

That he is one of the attorneys for the plaintiffs
herein.

The defendant asks for two things upon this mo-
tion:

First, an extension of time from November 10th
to December 8th, in which to comply with the
decree, so that it may prepare its assignments of
error and petition of appeal, whereupon it will
obtain a supersedeas pending the appeal. A reason-
able extension for the purpose of appeal is not
opposed.

Second, it asks to be relieved from that part of
the decree which orders the delivery of the plain-

tiffs' stock, and for an appraisal of said stock to determine its value. This relief we oppose as being tantamount to a reversal of the final decree.

This same question has been passed upon by your Honor many times, and is *res adjudicata*.

The affidavit of Alexander J. Hemphill, annexed to the moving papers herein, sets forth the matters upon which he was examined before Mr. Cochran, the master herein, and which the master passed upon in his report which was confirmed by you.

When the master refused to go into the value of the stocks and bonds in question, and which ruling your Honor sustained, the defendant made a motion, which your Honor heard April 12, 1916, asking for an order enlarging the interlocutory decree "so as to permit said master to take evidence as to the value of the securities pledged under the so-called French Loan."

1358

This application which is exactly the same as that now presented, was argued at length and denied by your Honor.

In opposition to said motion, deponent submitted and filed his affidavit dated April 8, 1916, setting forth his grounds of opposition, and said affidavit and the facts therein alleged, are now referred to and realleged with the same force and effect as though set forth in full herein.

1359

Defendant again brought up the same question upon the submission of the final decree, and argued it at length, so that it has been many times passed upon by your Honor.

The defendant is not electing to abide by the final decree and asking permission to deliver the cash value of the stock, to the plaintiffs, but alleges its determination to appeal in any event from the decree, and meanwhile pending its appeal, asks to

1360

Affidavit of Dudley F. Phelps.

start what is tantamount to condemnation proceedings of the stock, which would take several years and entail enormous expense, details of which are set forth in deponent's affidavit of April 8, 1916, *supra*.

Deponent respectfully asks to have this relief denied:

1361

FIRST.—Because your Honor has already denied it upon three previous occasions, and no new grounds are now set forth.

SECOND.—Because defendant has announced its determination in any event to appeal and obtain a supersedeas, so no possible harm can result to defendant before the Court of Appeals passes upon the question, whereas granting this relief would put the plaintiffs to great expense and postpone the hearing of the appeal, and if the judgment is finally affirmed without modification, to a needless waste of time and money.

1362

THIRD.—Because the defendant is estopped from raising this point at this late day, when it was not taken in its answer or during the trial (see deponent's affidavit of April 8th, upon prior motion).

DUDLEY F. PHELPS.

Sworn to before me this

6 day of November, 1916.

(NOTE.—The affidavit of Dudley F. Phelps, dated April 8, 1916, referred to in the foregoing affidavit, is printed at pages 328 to 333 of this record.)

Order Denying Defendant's Motion for Alternative Relief, but Granting a Stay. 1363

(Filed, November 18, 1916.)

At a Stated Term of the United States District Court, held in and for the Eastern District of New York, at the United States Court House and Post Office Building, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 18th day of November, 1916.

1364

Present—Hon. THOMAS I. CHATFIELD, District Judge.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

1365

The defendant having made a motion for an order, pursuant to the provisions contained in the decree herein entered October 5, 1916, asking for alternative or other relief, and relieving the defendant from making physical delivery of shares of the common stock of the Houston & Texas Central Railway Company, and staying the complainants from taking any steps or proceedings for enforcing the physical delivery of such shares of stock, or extending the time of the defendant to comply with

1366 *Order Denying Defendant's Motion for Alternative Relief.*

said provisions of said decree or order until the 8th day of December, 1916, and for such other and further relief in the premises as to the Court may seem just and proper, and the said motion having duly come on to be heard;

1367 NOW, on reading the notice of motion, dated the 3rd day of November, 1916; the affidavit of Alexander J. Hemphill, sworn to the 2nd day of November, 1916; the affidavit of Lewis H. Freedman, sworn to the 3rd day of November, 1916; and the affidavit of Dudley F. Phelps, sworn to the 6th day of November, 1916; and upon all the pleadings and proceedings herein, and after hearing counsel for both sides;

NOW, on motion of Dittenhoefer, Gerber & James, attorneys for the plaintiffs, it is

1368 ORDERED that pending the defendant's declared intention to appeal to the Circuit Court of Appeals, any and all proceedings to enforce the decree herein, on the part of the complainants, shall be stayed for sixty (60) days from October 5, 1916; and it is

FURTHER ORDERED that the motion of the defendant to fix an alternative value in place of the physical delivery of the stock is denied for the present, that is (1) pending the taking of an appeal with application for supersedeas and stay; or (2) unless the defendant asks to proceed under the decree and waives his right to appeal; or (3) until this Court without regard to the question of appeal by the defendant proceeds at the foot of the decree to make further order to carry it into effect.

THOMAS I. CHATFIELD,
U. S. D. J.

Defendant's Assignment of Errors. 1369

(Filed December 29, 1916.)

DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

1370

NOW COMES THE DEFENDANT, Southern Pacific Company, and files the following assignment of errors, upon which it will rely on its appeal from the judgment or decree in equity entered herein on the 5th day of October, 1916.

FIRST.—That the District Court of the United States for the Eastern District of New York erred in overruling the motion of the defendant upon the complaint and answer to dismiss the complaint.

1371

SECOND.—That said Court erred in entering the order dated the 11th day of March, 1914, denying the motion of the defendant to dismiss the complaint.

THIRD.—That said Court erred in denying the motion of the defendant for judgment upon the first separate defense pleaded in its answer, which alleged that there was a defect of parties and that there was an absence of an indispensable party.

FOURTH.—That said Court erred in denying the motion of the defendant for judgment upon the second separate defense pleaded in its answer, which alleged laches.

FIFTH.—That said Court erred in denying the motion of the defendant for judgment upon the third separate defense pleaded in its answer which alleged laches and notice.

SIXTH.—That said Court erred in denying the motion of the defendant for judgment upon the fourth separate defense pleaded in its answer which alleged laches and that the plaintiff was chargeable with notice thereof.

SEVENTH.—That said Court erred in denying the motion of the defendant for judgment upon the fifth separate defense pleaded in its answer, which alleged laches and notice thereof by the plaintiff and that by reason of the laches defendant had been deprived of certain testimony.

EIGHTH.—That said Court erred in denying the motion of the defendant for judgment upon the sixth separate defense pleaded in its answer, which alleged laches that the plaintiffs were chargeable with notice thereof and that by reason of the laches defendant had been deprived of certain testimony.

NINTH.—That said Court erred in denying the motion of the defendant for judgment upon the eighth separate defense pleaded in its answer, which alleged that the judgment in the Carey case was *res adjudicata*.

TENTH.—That said Court erred in denying the motion of the defendant for judgment upon the ninth separate defense pleaded in its answer, which alleged that the judgment in the Gernsheim case was *res adjudicata*.

ELEVENTH.—That said Court erred in denying the motion of the defendant for judgment upon the tenth separate defense pleaded in its answer, which alleged election and estoppel and that the plaintiff's testator by acquiescing in the Gernsheim and joining in the Carey cases elected to disaffirm all the steps taken in the foreclosure suit and under the reorganization plan.

1376

TWELFTH.—That said Court erred in entering the order of the 18th day of July, 1914, denying the motion of the defendant for judgment on the separate defenses other than the said Seventh separate defense.

THIRTEENTH.—That said Court erred in granting the interlocutory judgment or decree bearing date the 13th day of December, 1915.

1377

FOURTEENTH.—That said Court erred in overruling each and all of the respective exceptions filed herein by the defendant Southern Pacific Company to the report herein of said Joseph G. Cochran, Special Master, and in confirming said report.

FIFTEENTH.—That said Court erred in granting the motion of Sara Rosenfeld and Rosetta Cohn as Executrices under the Last Will and Testament of Charles Minzesheimer, for leave to intervene.

SIXTEENTH.—That said Court erred in entering the order bearing date the 6th day of July, 1916, permitting said Sara Rosenfeld and Rosetta Cohn as Executrices as aforesaid to intervene as parties plaintiff.

SEVENTEENTH.—That said Court erred in granting the motion of Michael Gernsheim for leave to intervene.

EIGHTEENTH.—That said Court erred in entering the order bearing date the 12th day of July, 1916, permitting said Michael Gernsheim to intervene as a party plaintiff.

NINETEENTH.—That said Court erred in denying the motion of the defendant to enlarge the scope of the matters referred to the Special Master by the interlocutory decree so as to permit the Special Master to take evidence as to the value of the securities pledged under the so-called French Loan and to authorize said Master to sit in the State of Texas for the purpose of taking said testimony or that an additional Master be appointed to take such testimony within the State of Texas, or that an open commission be issued to a Master or to some other suitable person in Houston, Texas, for the purpose of taking such testimony.

TWENTY.—That the Court erred in entering the order dated the 18th day of November, 1916, denying the motion of the defendant to enlarge the scope of the matters referred to the master by the interlocutory decree dated the 13th day of December, 1915.

TWENTY-FIRST.—That said Court erred in granting judgment in favor of the plaintiffs and against

Defendant's Assignment of Errors.

1381

the defendant and in entering the decree dated the 5th day of October, 1916.

TWENTY-SECOND.—That said Court erred in not dismissing the bill of complaint.

TWENTY-THIRD.—That said Court erred in denying the motion of the defendant for an order for alternative relief and relieving the defendant from making physical delivery of the shares of stock of the Houston & Texas Central Railroad Company.

1382

TWENTY-FOURTH.—That said Court erred in entering the order dated the 18th day of December, 1916, denying said motion of the defendant.

TWENTY-FIFTH.—That said Court erred in adjudging and decreeing that the defendant Southern Pacific Company in the year 1889 acquired and still has in its possession and under its control One hundred thousand (100,000) shares of the par or face value of Ten million dollars (\$10,000,000) of the common stock of the Houston & Texas Central Railroad Company, a corporation organized and existing under the Laws of the State of Texas other than as its own absolute property.

1383

TWENTY-SIXTH.—That said Court erred in adjudging and decreeing that the defendant Southern Pacific Company now has in its possession and holds (unless pledged subsequent to receipt) for the benefit of the complainants and the other stockholders of the Houston & Texas Central Railway Company respectively, who may come in and contribute to the expenses of this action, stock of the Houston & Texas Central Railroad Company, in the following or in any proportions:

For each seventy-seven and two hundred and Sixty-nine hundred thousandths (.77269) of a share of the stock of the Houston & Texas Central Railway Company held by the plaintiffs and by the other stockholders of the Houston & Texas Central Railway Company who may come in and contribute to the expenses of this action, respectively, the defendant Southern Pacific Company has in its possession and holds (unless pledged subsequently) for the benefit of the complainants and other stockholders, one (1) share of the capital stock of the Houston & Texas Central Railroad Company.

1385

TWENTY-SEVENTH.—That said Court erred in adjudging and decreeing that the said defendant Southern Pacific Company holds and has in its possession One hundred and twenty-nine and two-fifth ($129\frac{2}{5}$) shares of the common stock of the Houston & Texas Central Railroad Company, or any amount of said stock, for the benefit of and belonging to the said complainants Henry L. Bogert, Townsend Lawrence and Anita Lawrence as executors under the last will and testament of Walter B. Lawrence, deceased.

1386

TWENTY-EIGHTH.—That said Court erred in adjudging and decreeing that the said Southern Pacific Company deliver to the complainants Henry L. Bogert, Townsend Lawrence and Anita Lawrence as executors as aforesaid, One hundred and twenty-nine and two-fifth ($129\frac{2}{5}$) shares, or any amount of the common stock of the Houston & Texas Central Railroad Company and account for and pay over to them any or all dividends received by the Southern Pacific Company upon said stock, with interest at the rate of 6% from the date

of the receipt of said dividends, and thereupon complainants shall deliver and surrender to the defendant One hundred (100) shares of the common stock of the Houston & Texas Central Railway Company.

TWENTY-NINTH.—That said Court erred in adjudging and decreeing that the defendant Southern Pacific Company deliver to R. B. Whittemore, Henry Fitch and Russell H. Landale, as Trustees, and to such other stockholders of the Houston & Texas Central Railway Company as may be brought in as parties complainant, the proportionate number of shares of the common stock of the Houston & Texas Central Railroad Company which said Special Master shall report are held and owned by the defendant Southern Pacific Company, as provided and decreed by the interlocutory decree, or any amount of such common stock, and that the said defendant account for and pay over to them, respectively, any dividends received by the Southern Pacific Company upon the said stock, with interest at the rate of six per cent. (6%) per annum from the date of the receipt of such dividends, and that thereupon said respective stockholders of the Houston & Texas Central Railway Company shall deliver and surrender to the defendant the number of shares of stock of the Houston & Texas Central Railway Company possessed by them as found and reported by the said Special Master.

1388

1389

THIRTIETH.—That said Court erred in adjudging and decreeing that the said Special Master take testimony and report the amount of dividends and profits received by the defendant Southern Pacific Company upon the common stock of the Houston

& Texas Central Railroad Company to which under said interlocutory decree the complainants and the said R. B. Whittemore, Henry Fitch and Russell H. Landale as trustees and the other stockholders who may be brought in as parties plaintiff are entitled.

1391

THIRTY-FIRST.—That said Court erred in adjudging and decreeing that the defendant Southern Pacific Company has expended under the agreement for the reorganization of the Houston & Texas Central Railway Company no more than the sum of Two million, six hundred and two thousand, six hundred and fifteen and 77/100 dollars (\$2,602,615.77) in acquiring and obtaining possession of said common stock of the Houston & Texas Central Railroad Company, and that the sum of Twenty-six dollars, two cents and six mills (\$26.026) is the proportionate or pro rata share of such expenditure to be borne by each share of the outstanding capital stock of the Houston & Texas Central Railroad Company and to be paid in said proportion and amount by the said complainants

1392

and by the said R. B. Whittemore, Henry Fitch and Russell H. Landale, as trustees, and by the other stockholders of the Houston & Texas Central Railway Company who may be brought in as parties plaintiff, which said sum, with interest to the date of payment, shall be paid to the defendant by the said complainants and said R. B. Whittemore, Henry Fitch and Russell H. Landale, as trustees and by such other stockholders as may be brought in as parties plaintiff, respectively, at the time of and contemporaneously with the delivery to them respectively by the defendant of the shares of stock of the Houston & Texas Central Railroad Company and the payment of dividends,

with interest herein ordered and decreed to be delivered and paid by the defendant.

THIRTY-SECOND.—That said Court erred in adjudging and decreeing that inasmuch as it has been suggested by the defendant that the Southern Pacific Company did in the year 1911, pledge certificates of the capital stock the Houston & Texas Central Railroad Company held by it, including the stock which the said Southern Pacific Company, as by the interlocutory decree adjudged, holds as trustee for the complainants and others similarly situated, said master is directed to inquire into all the facts concerning said pledge and report the same to the Court to the end and that the final decree herein may make directions with respect to proper rights of any pledgee or lienor.

1394

THIRTY-THIRD.—That said Court erred in adjudging and decreeing that the defendant pay to the complainants Henry L. Bogert, Townsend Lawrence and Anita Lawrence, as executors under the Last Will and Testament of Walter B. Lawrence, deceased, their taxable costs and disbursements to be taxed by the Clerk of this Court, on notice to the defendant.

1395

THIRTY-FOURTH.—That said Court erred in holding that the Southern Pacific Company in acting under and carrying out the plan of reorganization of the Houston & Texas Central Railway Company, or in any step taken by it in carrying out the same, occupied the position of majority stockholder of the Houston & Texas Central Railway Company.

THIRTY-FIFTH.—That said court erred in holding that said Southern Pacific Company in acquiring

the stock of the Houston & Texas Central Railroad Company under the plan of reorganization of the Houston & Texas Central Railway Company was acting as a majority stockholder of said Railway Company, or as a trustee for the benefit of the minority stockholders of the said Railway Company, including the complainants and others similarly situated.

1397

THIRTY-SIXTH.—That if on any ground a liability of the defendant to plaintiffs can be sustained, nevertheless said court erred in not permitting the defendant to include in the amounts paid, and with which it should be credited as payments made by it in carrying out the plan of reorganization of the Houston & Texas Central Railway Company, and incurred in acquiring the stock of the Houston & Texas Central Railroad Company, the amounts of the judgments in favor of the Lackawanna Steel Company, Morgan's Louisiana & Texas Railroad and Steamship Company and the Southern Development Company, together with interest thereon.

1398

THIRTY-SEVENTH.—That said court erred in determining the credits to be given to the defendant on account of the acquisition of the stock of the Houston & Texas Central Railroad Company in not including the amount of said judgments with interest and in not taking into consideration the guarantee or the value thereof given by the defendant guaranteeing the payment of the principal and interest of the bonds issued by the Houston & Texas Central Railroad Company pursuant to the plan of reorganization of the Houston & Texas Central Railway Company.

THIRTY-EIGHTH.—That said court erred in not holding that the Southern Pacific Company in acting under and carrying out the plan of reorganization of the Houston & Texas Central Railway Company occupied the position of and was acting as an underwriter or banker.

THIRTY-NINTH.—That said court erred in not holding that the Southern Pacific Company in acting under and carrying out the plan of reorganization of the Houston & Texas Central Railway Company, occupied a position and was acting in a capacity entirely separate and distinct from that of owner of or as one having any ownership or control of stock of the Houston & Texas Central Railway Company.

1400

FORTIETH.—That said court erred in adjudging and decreeing that each and every allegation contained in the complaint of Henry L. Bogert and others, was true.

FORTY-FIRST.—That said court erred in adjudging and decreeing that the defendant Southern Pacific Company now holds and possesses 23,002-144 shares of stock of the Houston & Texas Central Railroad Company, or any other amount, in trust for the benefit of Henry Fitch and Russell H. Landale, as surviving trustees of stockholders of the Houston & Texas Central Railroad Company.

1401

FORTY-SECOND.—That said court erred in adjudging and decreeing that the said Henry Fitch and Russell H. Landale, as surviving trustees of stockholders of the Houston & Texas Central Railroad Company, were entitled to immediate possession

1402

Defendant's Assignment of Errors.

and absolute ownership as trustees of 23,002.144 shares of stock of the Houston & Texas Central Railroad Company, or any other amount, upon the following terms and conditions:

1403

Upon the said Trustees aforesaid, surrendering to the defendant Southern Pacific Company 17,776 shares of the Houston & Texas Central Railway Company stock now in their possession, together with Twenty-six dollars, two cents and six mills (\$26.026) for each share of the Houston & Texas Central Railroad Company stock delivered to them by the defendant, Southern Pacific Company, with interest thereon at six per cent. from February 10, 1891, to date, whereupon the defendant Southern Pacific Railway Company shall and is hereby ordered and directed to deliver to the said Henry Fitch and Russell H. Landale, as surviving trustees aforesaid, the said 23,002.144 shares of the Houston & Texas Central Railroad Company stock, together with the following dividends received by the defendant Southern Pacific Company upon said shares of stock:

1404

\$138,012.86 with interest thereon at six per cent. from March 30, 1903;

\$460,042.88 with interest thereon at six per cent. from June 30, 1911;

\$69,006.43 with interest thereon at six per cent. from June 18, 1913.

FORTY-THIRD.—That said court erred in adjudging and decreeing that the defendant Southern Pacific Company now holds and possesses 258.8 shares of stock of the Houston & Texas Central Railroad Company, or any other amount, for the benefit of Sara Rosenfeld and Rosetta Cohn as Ex-

ecutrices under the Last Will and Testament of Charles Minzesheimer.

FORTY-FOURTH.—That said court erred in adjudging and decreeing that Sara Rosenfeld and Rosetta Cohn as Executrices of Charles Minzesheimer are entitled to immediate possession and absolute ownership as Executrices aforesaid of 258.8 shares of stock of the Houston & Texas Central Railroad Company, or any other amount, upon the following terms and conditions:

Upon the said Executrices surrendering to the defendant Southern Pacific Company 200 shares of the Houston & Texas Central Railway Company stock now in their possession, together with twenty-six dollars, two cents and six mills (\$26.026) for each share of the Houston & Texas Central Railroad Company stock delivered to them by the defendant, Southern Pacific Company, with interest thereon at six per cent. from February 10, 1891, to date, whereupon the defendant Southern Pacific Company shall and is hereby ordered and directed to deliver to the said Sara Rosenfeld and Rosetta Cohn as Executrices under the Last Will and Testament of Charles Minzesheimer, said 258.8 shares of the Houston & Texas Central Railroad Company stock, together with the following dividends received by the defendant Southern Pacific Company upon said shares of stock:

\$1552.80 with interest thereon at six per cent. from March 30, 1903;

\$5176.00 with interest thereon at six per cent. from June 30, 1911;

\$776.40 with interest thereon at six per cent. from June 18, 1913.

1406

1407

FORTY-FIFTH.—That said court erred in adjudging and decreeing that the defendant Southern Pacific Company now holds and possesses 957.56 shares of stock of the Houston & Texas Central Railroad Company, or any other amount, for the benefit of Michael Gernsheim.

1409

FORTY-SIXTH.—That said court erred in adjudging and decreeing that Michael Gernsheim is entitled to immediate possession and absolute ownership of 957.56 shares of stock of the Houston & Texas Central Railroad Company, or any other amount, upon the following terms and conditions:

1410

Upon said Michael Gernsheim surrendering to the defendant Southern Pacific Company 740 shares of the Houston & Texas Central Railway Company stock now in his possession, together with twenty-six dollars, two cents and six mills (\$26.026) for each share of the Houston & Texas Central Railroad Company stock delivered to him by the defendant Southern Pacific Company, with interest thereon at six per cent. from February 10, 1891, to date, whereupon the defendant Southern Pacific Company shall and is hereby ordered and directed to deliver to said Michael Gernsheim the said 957.56 shares of Houston & Texas Central Railroad Company stock together with the following dividends received by the defendant Southern Pacific Company upon said shares of stock.

\$5745.36 with interest thereon at six per cent. from March 30, 1903;

\$19151.20 with interest thereon at six per cent. from June 30, 1911;

\$2872.68 with interest thereon at six per cent. from June 18, 1913.

Defendant's Assignment of Errors.

1411

FORTY-SEVENTH.—That said court erred in adjudging and decreeing that the defendant should perform the acts as directed in the final decree dated the 5th day of October, 1916, to be done and delivered the stock as therein directed on or before the 10th day of November, 1916.

WHEREFORE defendant Southern Pacific Company prays that the decree may be reversed and that said court may be directed to dismiss the bill of complaint herein, together with costs.

1412

Dated, December 29, 1916.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant,
Office and P. O. Address,
54 Wall Street,
New York, N. Y.

To

MESSRS. DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainants.

1413

JOSEPH G. COCHRAN, Esq.,
Clerk, U. S. District Court,
Eastern District of N. Y.

1414 Defendant's Petition for Appeal and Allowance.

(Filed December 29, 1916.)

DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF NEW YORK.

1415	<p>HENRY L. BOGERT et al., Complainants, against SOUTHERN PACIFIC COMPANY, Defendant.</p>
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The above named defendant Southern Pacific Company, a corporation, conceiving itself aggrieved by the judgment or decree made and entered in the above entitled cause, on the 5th day of October, 1916, does hereby appeal from said judgment or decree to the United States Circuit Court of Appeals for the Second Circuit, for the reason specified in the Assignment of Errors, which is filed herewith.

1416 And the said Southern Pacific Company, a corporation, prays that it be allowed this appeal, and that a transcript of the record, papers and proceedings upon which said judgment or decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated, December 29, 1916.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant,
Southern Pacific Company,
54 Wall Street,
Manhattan,
New York, N. Y.

Appeal allowed, December 29, 1916.

THOMAS I. CHATFIELD,
District Judge.

**Stipulation for Stay During, and No 1417
Bond on, Appeal.**

(Filed December 29, 1916.)

DISTRICT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

1418

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that no bond or undertaking of the defendant above named on the appeal herein to the United States Circuit Court of Appeals for the Second Circuit be required and that said appeal shall act as a supersedeas and that all proceedings in this Court may be stayed with the same force and effect as though a supersedeas had been obtained, and that an order may be entered herein to that effect without further notice.

1419

Dated, December 28, 1916.

DITTENHOEFER, GERBER & JAMES,
Attorneys for Complainants.

JOLINE, LARKIN & RATHBONE,
Attorneys for Defendant.

1420 Order for Stay During, and No Bond on, Appeal.

(Filed December 29, 1916.)

At a Stated Term of the District Court of the United States for the Eastern District of New York, held at the Borough of Brooklyn, City of New York, the 29th day of December, 1916.

Present—Hon. THOMAS I. CHATFIELD, District Judge.

1421

HENRY L. BOGERT et al.,	}
Complainants,	
against	
SOUTHERN PACIFIC COMPANY,	
Defendant.	

1422

The defendant Southern Pacific Company, a corporation, having heretofore filed herein its petition for an appeal, and having duly filed herewith an assignment of errors, and on reading and filing the annexed stipulation, it is

ORDERED that said appeal be and the same hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit, the judgment or decree dated October 5, 1916, heretofore entered herein, and that no bond or undertaking on said appeal is hereby required.

FURTHER ORDERED that said appeal shall act as a supersedeas and that all proceedings in this Court may be stayed with the same force and effect as though a supersedeas had been obtained, and that an order may be entered herein to that effect without further notice.

THOMAS I. CHATFIELD,
D. J.

Citation on Appeal.

1423

(Filed December 29, 1916.)

DISTRICT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

1424

United States of America, ss.:

To Henry L. Bogert, Townsend Lawrence and Anita Lawrence, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased; Henry Fitch and Russell H. Landale, as Surviving Trustees of stockholders; Sara Rosenfeld and Rosetta Cohn, as Executrices under the Last Will and Testament of Charles Minzesheimer; and Michael Gernsheim:

1425

You Are Hereby Cited and Admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit to be holden at the Borough of Manhattan, City of New York, in the circuit above named on the 27th day of January, 1917, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Eastern District of New York, in

1426

Equity, wherein Southern Pacific Company is defendant-appellant and you are complainants-appellees, to show cause, if any there be, why the judgment or decree in said appeal mentioned should not be reversed, modified or corrected, and speedy justice should not be done, in that behalf.

1427

Given under my hand at the Court House, Borough of Brooklyn, City of New York, Eastern District of New York, this 29th day of December, in the year of our Lord one thousand nine hundred and sixteen and of the Independence of the United States the one hundred and fortieth.

THOMAS I. CHATFIELD,
District Judge.

1428

Stipulation and Order Dispensing 1429
with Printing of Certain Exhibits.

(Filed February 21, 1917.)

DISTRICT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
 Complainants,

against

SOUTHERN PACIFIC COMPANY,
 Defendant.

1430

IT IS HEREBY STIPULATED that the following exhibits introduced upon the trial and hearing in the above entitled action, to wit:

Defendant's Exhibits B, C, D, E and F on the trial of the separate defenses (being the records in other cases on appeal and the opinions in connection therewith); and

Complainants' Exhibits 14, being the Trust Mortgage and Guaranty Agreement referred to in the record as "the French Loan Agreement," need not be printed in the record on appeal herein, but that they may be submitted to the Circuit Court of Appeals and referred to and quoted from as though printed in the record upon the argument of this cause, provided the said Circuit Court of Appeals so orders.

1431

AND IT IS FURTHER HEREBY STIPULATED that the twenty-ninth annual report of

1432 *Stipulation and Order Dispensing with Printing
of certain Exhibits.*

1433 the Southern Pacific Company, of which Complainants' Exhibit 11 is a part, and all of the original certificates of the stock of the Houston & Texas Central Railway Company in the possession of the complainants, the intervenors herein, or the Committee of the Minority Stockholders of the said railway, may be submitted to the Circuit Court of Appeals and referred to and quoted from as though printed in the record upon the argument of this cause, provided the said Circuit Court of Appeals so orders. Order to this effect may be entered without further notice.

Dated, February 21, 1917.

DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainants.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant.

1434 So ordered February 21, 1917.

THOMAS I. CHATFIELD,
U. S. D. J.

Stipulation as to Record.

1435

(Filed February , 1917.)

DISTRICT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF NEW YORK.

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

1436

IT IS HEREBY STIPULATED AND AGREED
that the foregoing is a true transcript of the rec-
ord of the said District Court in the above entitled
matter as agreed on by the parties.

Dated, February 26, 1917.

DITTENHOEFER, GERBER & JAMES,

1437

Solicitors for Complainants.

JOLINE, LARKIN & RATHBONE,

Solicitors for Defendant.

*Geo. Gordon Battle**Solicitor for Complainants**Rosenfeld & Gernsheim*

1438

Clerk's Certificate.

DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF NEW YORK.

1439

HENRY L. BOGERT et al.,
Complainants,

against

SOUTHERN PACIFIC COMPANY,
Defendant.

I, Percy G. B. Gilkes, Clerk of the District Court of the United States of America for the Eastern District of New York, do hereby certify that the foregoing is a ^{copy of the} correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

1440

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Eastern District of New York, this *third* day of *March* ~~February~~, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the said United States the one hundred and forty-second.

PERCY G. B. GILKES,

(Seal)

Clerk.

By

J. E. Cochran

22779

Deputy Clerk.

Order.

1441

At a Regular Term of the United States Circuit Court of Appeals for the Second Circuit, held at the Court House and Post Office Building, in the Borough of Manhattan, City, County and State of New York, the 23 day of March, 1917.

1442

Present—Hon. ALFRED C. COXE,
 Hon. HENRY G. WARD,
 Hon. HENRY WADE ROGERS,
 Hon. CHARLES M. HOUGH.
Judges.

HENRY L. BOGERT, *et al.*,
 Complainants-Appellees,

1443

AGAINST

SOUTHERN PACIFIC COMPANY,
 Defendant-Appellant.

On the annexed stipulation of the solicitors for all of the parties to the above-entitled cause, it is

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ORDERED, That one copy each of Defendant's Exhibits B, C, D and F, and three copies each of Defendant's Exhibit E and Complainant's Exhibit 14 may be submitted to this Court and referred to and quoted from upon the argument of this cause as though the same had been printed in the record on appeal herein; and also

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Order.

that (if the Appellate Court shall then so desire) three copies of the Twenty-ninth Annual Report of the Southern Pacific Company and all the original certificates of stock of Houston & Texas Central Railway Company in the possession of the complainants may be submitted to the Appellate Court and referred to and quoted from upon the argument of this cause.

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ALFRED C. COXE,
U. S. J.

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UNITED STATES CIRCUIT COURT OF 1449
APPEALS,

FOR THE SECOND CIRCUIT.

HENRY L. BOGERT, *et al.*,
Complainants-Appellees,

AGAINST

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant.

1450

WHEREAS, an order was duly made by the District Court in the above-entitled action, as appeared from pages 477 and 478 of the Transcript of the Record on Appeal herein, dispensing with the printing of Defendant's Exhibits B, C, D, E and F and Complainant's Exhibit 14, and allowing the same and also the Twenty-ninth Annual Report of the Southern Pacific Company, and all the original certificates of stock of Houston & Texas Central Railway Company, in the possession of the complainants, to be submitted to the Appellate Court and referred to and quoted from upon the argument of this cause as though printed in the record on appeal, *all provided* that the Appellate Court should so order; and 1451

WHEREAS, there is available for such purpose but one copy each of Defendant's Exhibits B, C, D and F, by reason of the fact that the same are the printed records on various judicial appeals taken upwards of five years ago; therefore it is hereby 1452

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Order.

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STIPULATED AND AGREED, that (subject to the approval of this Court) an order may be entered herein without notice providing that one copy each of Defendant's Exhibits B, C, D and F and three copies each of Defendant's Exhibit E and Complainant's Exhibit 14, may be submitted to this Court and referred to and quoted from upon the argument of this cause as though the same had been printed in the record on appeal herein; and also that (if the Appellate Court shall then so desire) three copies of the Twenty-ninth Annual Report of the Southern Pacific Company and all the original certificates of stock of Houston & Texas Central Railway Company in the possession of the complainants may be submitted to the Appellate Court and referred to and quoted from upon the argument of this cause.

1455

Dated, March 22, 1917.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant-Appellant.

DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainants-Appel-
lees, Bogert, Lawrence, Lawrence,
Fitch and Landall.

1456

GEO. GORDON BATTLE,
Solicitors for Complainants-Appel-
lees, Rosenfeld, Cohn and Gern-
sheim.

Opinion.

1457

UNITED STATES CIRCUIT COURT OF
APPEALS,

FOR THE SECOND CIRCUIT.

No. 253—October Term, 1916.

Argued April 3, 1917. Decided July 2, 1917.

HENRY L. BOGERT, *et al.*, as Ex-
ecutors, etc.,
Complainants-Appellees,

v.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant.Appeal from
the District
Court of the
United States
for the Eastern
District of
New York.Before Ward,
Rogers and
Hough, Cir-
cuit Judges.

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DITTENHOEFER, GERBER & JAMES, for Henry L.
Bogert, *et al.*GEORGE GORDON BATTLE, for Sarah Rosenfeld, *et*
al.

JOLINE, LARKIN & RATHBONE, for Defendant-Appellant.

WARD, *Circuit Judge*:

The history of the long struggle of the minority stockholders of the Houston & Texas Central Railway Company with the Southern Pacific Company, arising out of the financial difficulties of the Railway Company, down to the present suit, can be learned by reference to *Carey v. Houston & Texas Central Ry. Co.*, 45 Fed., 438; 52 Fed. Rep., 671; 9 C. C. A., 687; 161 U. S., 115; *McArdle v. Olcott*, 189 N. Y., 376; *Lawrence v.*

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1461

Opinion.

Southern Pacific Co., 180 Fed. Rep., 822; 228 U. S., 137.

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The grievance alleged in these prior suits was a corporate grievance, viz., that the foreclosure of the mortgages on the Railway Company's various lines had been brought about fraudulently by the Southern Pacific Company. The merits were not passed upon in any of these cases, each being dismissed on the ground that the decree of foreclosure could not be attacked collaterally because there was no proof of fraud and in the last case *supra* because the Railway Company was an indispensable party.

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The present suit on behalf of the minority stockholders was brought profiting by their previous mistakes, on an entirely different theory. It admits the validity of the foreclosure decree, asserts no corporate right of the Railway Company, but complains that the Southern Pacific Company has used its power as the majority and controlling stockholder for its own benefit to the detriment of the minority stockholders.

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Briefly stated, the cause of action is as follows: The Railway Company owed two classes of indebtedness; first, interest in arrear amounting with expenses of reorganization to some \$2,600,000; second, a floating indebtedness to the Lackawanna Iron & Coal Co., \$555,914.25; to Morgan's Louisiana & Texas Railway & Steamship Company, \$1,795,570.81; to the Southern Development Company, \$858,113.15, aggregating with interest some \$3,000,000.

The reorganization was, generally speaking, wise, fair and eventually proved very successful. It was a part of the agreement that the Southern Pacific Company should pay the first indebtedness above mentioned amounting to \$2,602,615.77

and it did so. The stockholders of the Railway Company were given a right to their proportion of the capital stock of the reorganized company upon payment of their proportion of both the above accounts, which amounted to an assessment of about \$71 a share. The Southern Pacific Company was given the right to take all stock not taken by the stockholders of the old company in consideration of its payment of the first account and of certain guaranties which it was never called upon to perform. As no stockholder of the old company was willing to pay the assessment of \$71 a share the Southern Pacific Company got the whole capital of \$10,000,000 of the reorganized company for an outlay of about \$26 a share. This is the unfairness which the minority stockholders say was imposed upon them by means of the control which the Southern Pacific Company as majority stockholder exercised over the Railway Company. 1466

In the District Court Judge Chatfield has set forth the facts and the law very clearly in two opinions reported 215 Fed. Rep., 218, and 226 Fed. Rep., 500, and he entered a decree requiring the Southern Pacific Company to deliver to the minority stockholders of the Railway Company their proportionate share of the stock of the reorganized company and of the dividends collected with interest thereon upon payment of \$26.026 a share with interest from February 10, 1891. 1467 1468

We will briefly dispose of the defendant's objections, some of which were not pressed in the court below.

(1) As in this case no corporate right at all was asserted the Railway Company was not even a necessary party.

(2) We think there is nothing in the objection that the Southern Pacific Company cannot be held liable because it was not a stockholder of the Railway Company. This is literally true, but the record makes it perfectly plain that through its control of the Morgan Company which held a majority of the stock of the Railway Company the Southern Pacific Company did cause the
1470 Railway Company to waive defenses originally pleaded in the foreclosure suit and to consent to a decree of foreclosure. It could not do with impunity indirectly what it had no right to do directly.

(3) The defendant insists that it should receive credit for so much of the Railway Company's floating indebtedness as it gave up to
1471 carry the reorganization through and that the minority stockholders should be assessed for their proportionate share of it. There is great force in this contention as stated. The trouble is that it was never raised in the case by pleading or otherwise until an exception was taken to the report of the Special Master. There is nothing in the record to show what, if anything, the Southern Pacific Company did give up. So far as appears, it was not a stockholder of the
1472 Lackawanna Company or of the Development Company and could be interested in the claim of the Morgan Line only to the extent that it would be entitled as a stockholder to receive after payment of that company's indebtedness. Furthermore, the Morgan Line was secured by bonds of the Railway Company as collateral of the face value of \$880,000. Under these circumstances it is quite impossible to say what, if any-

thing, the Southern Pacific Company gave up in connection with the Railway Company's floating indebtedness.

(4) It is next objected that because Lawrence, the complainant's decedent, had knowledge of and contributed to all the prior suits against the Southern Pacific Company, he is estopped by the decrees in those suits upon the principle of *res adjudicata*. But the issue proposed in them was different and nothing was decided except that the respective courts had no jurisdiction. 1474

(5) Then it is argued that the complainant is concluded by virtue of an election between inconsistent remedies, to wit, because the earlier suits of which he was a promoter, proceeded on the ground of fraud, whereas this suit goes on the ground of an implied trust. But there was no election. These claims were not opposite and irreconcilable. None of the former suits passed upon the merits, the courts simply deciding that they had no jurisdiction to attack the foreclosure decree collaterally, *Henry v. Herrington*, 193 N. Y., 218. A fruitless attempt to recover by an unavailable remedy cannot deprive one of his rights properly recoverable by a different and appropriate remedy, *Standard Oil Co. v. Hawkins*, 74 Fed. Rep., 395; *Barnsdall v. Walkmayer*, 142 Fed. Rep., 415, 420. 1475

(6) We do not think that the circumstances of this case justify defeating the complainant because of laches. One familiar ground is acquiescence, but the minority stockholders have not slept on their rights. They have been striving

Opinion.

1477

for many years to recover. No acquiescence but exactly the contrary, a continuous and vigorous protest appears. So far as the defense of laches depends not on the mere passage of time, but upon another familiar ground, viz., a change in the situation prejudicial to the defendant, there is no evidence whatever to sustain it. The exact nature of the case has been known to the defendant from the beginning and there is no substantial dispute of fact. No equities have intervened. It would be most inequitable to forfeit the complainant's rights notwithstanding the very long and unusual delay in prosecuting them.

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(7) As the defendant owns the whole of the reorganized company's capital and contends that it is worth but little more than the assessment at \$26 a share, a long inquiry would have to be gone into to ascertain its value. Therefore we think the court below was right in requiring the stock to be delivered *in specie*.

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(8) What we have heretofore said on the subject of *res adjudicata* and election disposes of the objection made to the intervention of Gernsheim on these grounds. Intervention after interlocutory decree in favor of the complainant was proper, 1 Foster's Federal Practice, p. 434.

1480 The objection to the intervention of the representatives of Minzesheimer, dec'd, because he is not shown to have owned his stock before the foreclosure proceedings is founded on Equity Rule 27. That rule, however, applies to stockholders' suits asserting derivative rights on behalf of the corporation, whereas this suit is a representative or class suit under Equity Rule 38.

Decree affirmed.

Dissenting Opinion.

1481

UNITED STATES CIRCUIT COURT OF
APPEALS,

FOR THE SECOND CIRCUIT.

No. 253—October Term, 1916.

Argued April 3, 1917. Decided July 2, 1917.

1482

HENRY L. BOGERT, *et al.*, as Ex-
ecutors, etc.,
Complainants-Appellees,

v.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant.Appeal from
the District
Court of the
United States
for the Eastern
District of
New York.Before Ward,
Rogers and
Hough, Cir-
cuit Judges.

1483

HOUGH, J. (dissenting in part):

While concurring in the main with the majority, it seems to me plain that defendant should have received credit upon the accounting for such of the floating indebtedness of the Houston &c. Rwy. as it gave up in the reorganization as carried through. We have held the Southern Pacific to an account as a majority shareholder, because the majority holder or holders of record were but defendant's puppets—to which proposition I agree. 1484

But defendant when it took all the shares of the reorganized or new corporation, after these plaintiffs had declined to take any, certainly lost what the old company owed to the Southern Development Co. and Morgan's &c. Co. in the

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Dissenting Opinion.

very real sense of having no one to pay the debts. To have caused the new or reorganized corporation to pay these debts (when Southern Pacific practically owned both debtor and creditors) would have been merely taking money out of one pocket and putting it in the other—the debts would have remained lost just the same.

1486

It is because this defendant owned and controlled the companies which were at once confessed creditors, and themselves the immediate controllers of the old Houston &c. Rwy., that liability has been imposed on defendant; but why plaintiffs should now receive their share of what defendant got, without paying their share of what defendant lost, is quite beyond me. I think such credit or allowance inheres in the very reasons for our decision. If the Southern Pacific

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had itself been sole unsecured creditor of, and majority shareholder in the old Houston &c. Rwy., and the same kind of reorganization had occurred—it is inconceivable that the minority stock owners would have been let in without paying their share of the floating debt. Yet we seem now to admit them as shareholders, while leaving the burden of unpaid debt to be shouldered by the concern which we hold to have been (in effect) the majority owner. That the point was not pleaded is immaterial; the matter is a detail of accounting.

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As for the difficulty of ascertaining just what was the indebtedness over collateral, it may be great; but the legal error below was in refusing to consider the matter at all.

On the question of laches, I venture to emphasize what seems to me the logical result of our decision.

The action at bar was begun over twenty-five years after it arose.

In the sense of inactivity or acquiescence there was no laches at all; but every effort was legally misdirected until this suit began. It rests not on fraud, nor concealment; but on the assertion of a legal right, which is now enforced by declaring a constructive trust and decreeing an accounting. No statute of limitations was pleaded; this we have said is not essential in equity (*Waller v. Texas &c. Co.*, 229 F. R. at 92) meaning that the advantage of measuring by the Statute a plaintiff's negligence in pursuit, does not rest on pleading. If the act is relied on as a bar, it must be pleaded (*Sullivan v. Portland &c. Co.*, 94 U. S., 806). We have measured laches by analogy with the Statute (*Venner v. Central Trust Co.*, 204 F. R., 779), and done so (in admiralty) even when the party claiming the benefit was a foreign corporation in whose favor the Statute did not run. (*Davis v. Smokeless Fuel Co.*, 196 F. R., 753.)

But in principle this court has adhered firmly to the doctrine that its equity jurisdiction is not subject to limitations of time or other matters created by State laws (*Kirby v. Lake Shore &c. R. R.*, 120 U. S. at 138, and see *Hubbard v. Manhattan Trust Co.*, 87 F. R., 51). Yet where the jurisdiction is concurrent as between law and equity, the Chancellor is bound to apply the Statute (*Hall v. Law*, 102 U. S., at p. 466) "in other cases (he) acts only by analogy, and not in obedience to the statutes."

It follows that the present decision holds in substance that there is no remedy at law for these plaintiffs, that equity is the only juris-

1493

Dissenting Opinion.

diction for them, and that twenty-five years of failure to discover an always existing cause of action, based on facts of almost public notoriety—does not constitute laches, in the absence of silence, inaction, or acquiescence by plaintiffs; or loss of advantages or change of situation caused or contributed to by plaintiffs—on defendant's part.

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In this holding I concur, extreme as the facts are—on the assumption that the case is not one of concurrent jurisdiction. I make that assumption only because the parties have assumed it.

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IN THE
UNITED STATES CIRCUIT COURT OF
APPEALS,
SECOND CIRCUIT.

HENRY L. BOGERT, TOWNSEND LAW-
RENCE and ANITA LAWRENCE, as
Executors under the Last Will
and Testament of Walter B.
Lawrence, deceased, suing on be-
half of themselves and other
stockholders of the Houston &
Texas Central Railway Com-
pany similarly situated who may
come in and contribute to the
expenses of this action, HENRY
FITCH and RUSSELL H. LANDALE,
as Surviving Trustees of stock-
holders, SARA ROSENFELD and
ROSETTA COHN, as Executrices
under the Last Will and Testa-
ment of Charles Minzesheimer
and Michael Gernsheim,
Complainant-Appellees,

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AGAINST

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant.

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Petition for Rehearing.

Now comes Southern Pacific Company, De-
fendant-Appellant, in the above cause and moves
this Court to grant it a rehearing for the rea-
sons hereinafter stated:

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Petition for Rehearing.

I.

The majority opinion of this Court states:

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“The defendant insists that it should receive credit for so much of the Railway Company’s floating indebtedness as it gave up to carry the reorganization through and that the minority stockholders should be assessed for their proportionate share of it. There is great force in this contention as stated. The trouble is that it was never raised in the case by pleading or otherwise until an exception was taken to the report of the Special Master. There is nothing in the record to show what, if anything, the Southern Pacific Company did give up. So far as appears, it was not a stockholder of the Lackawanna Company or of the Development Company and could be interested in the claim of the Morgan Line only to the extent that it would be entitled as a stockholder to receive after payment of that company’s indebtedness. Furthermore the Morgan Line was secured by bonds of the Railway Company as collateral of the face value of \$880,000. Under these circumstances it is quite impossible to say what, if anything, the Southern Pacific Company gave up in connection with the Railway Company’s floating indebtedness.”

(a)

The Seventh separate defense in the Answer of the defendant sets forth the history of the acquisition of the stock of the Railway Company by the Morgan Company, the foreclosure of the

Petition for Rehearing.

1505

various mortgages on the property of the Railway Company, the floating indebtedness of the company at the time of foreclosure and the Railway Company's reorganization. In referring to the floating debt it set forth the loans made by the Morgan Company and the entry of the judgment in favor of that company for \$1,795,570.81 which remained unpaid and was a lien upon the property of the Railway Company, less whatever was realized upon the collateral held by the Morgan Company and except so far as the Morgan Company might be entitled in respect of the \$880,000 principal amount of general mortgage bonds of the reorganized company. This defense further pleads and sets forth that under the plan there were to be issued to the Morgan Company and the Development Company in satisfaction of \$880,000 of indebtedness to both of said companies, \$880,000 principal amount of new general mortgage bonds and that the stockholders and floating debt creditors having failed to avail themselves of the provisions of the Plan of Reorganization, the defendant Southern Pacific Company provided and paid the entire amount of the cash payments to be made under the plan and in consideration of such payment and of the guaranties and liabilities incurred by the Southern Pacific Company, as provided in said agreement, all of the capital stock of the organized company was delivered to it (fols. 327-365).

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The stipulation offered upon the trial of the main issue shows that a judgment was entered in favor of the Morgan Company for \$1,795,570.81 with interest at the rate of 8%, upon which execution was issued and returned unsatisfied (fol. 698).

1509

Petition for Rehearing.

Upon the settlement of the interlocutory decree the District Judge handed down a memorandum to the effect that the floating debt holders were wiped out and were provided for if they wished to share in the reorganization and that they "cannot claim the right to compel in equity a *pro rata* reimbursement unless they have preserved the right of action in law or in equity against the stock generally" (fol. 871), and the Court thereupon refused to refer to the Special Master the question of the amount due the floating debt creditors.

(b)

Pages 1079-1097 appearing in the printed record in the suit of *Carey v. Houston & Texas Railway Company* set forth the report of E. Francis Hyde and John H. Allen, fixing the amount to be paid by the stockholders under the Plan at 71 4/10% for each share of stock. Annexed to this report are itemized statements marked "C" and "D" showing the amounts due the Morgan Company.

Furthermore, the record shows that while the defendant attempted to have the Master take proof as to the amount to which the Morgan Company was entitled, the District Court refused to permit the proof to be taken.

The record therefore shows that the facts in relation to the Morgan judgment were pleaded and that the amount due the Morgan Company could be readily ascertained.

(c)

This action as brought prayed for an accounting,

Petition for Rehearing.

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“for all stocks, moneys, property, benefits and advantages which it (Southern Pacific) received, acquired, became or is entitled to pursuant and in furtherance of or because of the execution of the Reorganization Agreement hereinbefore referred to and that on such accounting the said Southern Pacific Company be credited with such moneys which may have been paid on account of guaranties and expenses of carrying out the said reorganization and given all other proper credits (fol 78).” 1514

No prayer for the delivery of shares of stock is contained in the bill. The question litigated was whether or not the complainants were entitled to an accounting. Such question when resolved in favor of the complainants would result in an interlocutory decree for an accounting. 1515
Upon the taking of the account, proper debits and credits would be determined. The question of what items should be considered as proper debits and credits would only arise upon the accounting and could in no way be determined or in any way urged upon the trial of the question whether or not an accounting was to be had.

Under the form of action as brought by the complainants the question of whether the Morgan judgment was a proper credit to which the Southern Pacific Company was entitled could not arise until after the entry of the interlocutory decree. 1516

II.

The majority opinion of this Court states that the complainants should not be defeated because

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Petition for Rehearing.

of laches for the reason that the defense of laches depended not on the mere passage of time "but upon another familiar ground, viz., a change in the situation prejudicial to the defendant. There is no evidence whatever to sustain it."

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The Southern Pacific Company had pledged the stock of the Railroad Company under the French loan prior to any claim having been made by anyone for delivery of the same or any part thereof.

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The summons in the present suit is dated and was served subsequent to the 26th day of July, 1913. The majority opinion of this Court in referring to the prior suits states that the grievance alleged in those suits was a corporate grievance and in fact the former Lawrence suit was dismissed upon the ground that the Railway Company was an indispensable party. No claim was made in any of such suits and no decree could have been entered in any of them decreeing the physical delivery of any shares of stock which the Southern Pacific Company acquired in carrying out the Plan of Reorganization. Prior to the beginning of the present suit therefor no claim had ever been made for the physical delivery of any of such shares of stock.

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Prior to the beginning of this suit and under date of March 1, 1911, the French Loan was made. When this loan was made the Southern Pacific Company was entitled to assume that its right to the shares of stock was unquestioned and that the only claims made against it could result only in the payment of money for damages sustained by the minority stockholders.

Petition for Rehearing.

1521

This French Loan Agreement contained the following:

(a) "The company covenants and agrees that it is the lawful owner of said securities and that the same have been lawfully created and issued, are fully paid and *are not subject to any prior pledge, charge or equity* (page 22).

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(b) In case default shall be made in the due and punctual observance or performance of any of the terms, *covenants*, conditions or requirements contained in said bonds and in this Indenture * * * then and in any and every such case the trustee in his discretion may * * * and shall, upon the written request of the holders of twenty-five per cent. in amount of the bonds issued hereunder and then outstanding by notice in writing delivered to the Railway Company and the Company, declare the principal of all bonds issued hereunder and then outstanding to be due and payable immediately; * * * " (page 29).

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(c) *Prior to default in any of the provisions of the Trust Indenture* the company was given the right to withdraw all (but not less than all) the securities of any one issue and to substitute other securities of not less appraised value than the last previously appraised value of the securities so to be withdrawn, *provided, however*, that upon each and every withdrawal and substitution the securities offered in substitution, in each instance, shall be (1) of a character approved by the Appraisers ap-

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Petition for Rehearing.

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pointed hereunder and shall be (2) equal in appraised value, at the time of the proposed substitution hereunder, to the last previously appraised value of the securities to be withdrawn; and also that (3) the securities offered in substitution and those remaining on deposit (in each instance), shall be equal in value, as appraised or reappraised, at the time of such proposed substitution to one hundred and twenty per centum (120%) of the amount of bonds then outstanding hereunder; and, provided further, (4) that the aggregate interest and dividends during each of the two years immediately prior to the proposed substitution actually paid upon the securities offered in substitution and upon the other securities remaining on deposit hereunder, shall have been equal to at least 120% of the interest payable on the bonds then outstanding hereunder" (p. 23).

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The French Loan Agreement causes a substantial change of position prejudicial to the Southern Pacific Company. The Southern Pacific Company is exposed to a claim by the French Banks that the decree entered in this suit amounts to a breach of the covenant that it owns all of the stock of the Houston & Texas Central Railroad Company and that none of them are subject to any prior pledge, charge or equity and that because of the breach of this covenant the trustee should declare the principal of all the bonds, amounting to 250,000,000 francs, due. That such a step is not mere speculation is shown by the agreement itself which requires the ownership of all stock to be re-

Petition for Rehearing.

1529

tained, the corporate existence of each railroad to be maintained (pages 17, 19) and outside interests or anything which might prevent the operation of all railroads, the stock of which was pledged, as a single system, excluded.

The right to withdraw any of the collateral can only be exercised while the Southern Pacific Company is not in default. If the entry of the decree in this suit be claimed to constitute a breach of the covenant that the Southern Pacific Company owned all the collateral, it is questionable whether said company would be able to obtain possession of the stock of the Railroad Company except upon payment of the *entire* principal of the French loan. 1530

To withdraw the stock of the Railroad Company for the purpose of complying with the decree, the Southern Pacific Company must withdraw not only so much of the stock of the Railroad Company as is to be delivered to the complainants, but all of the stock. Under the terms of the French Loan Agreement a part cannot be withdrawn. Upon such withdrawal there must be substituted securities satisfactory to appraisers to be appointed, which shall be equal in appraised value to the last previously appraised value of the securities to be withdrawn, and the securities offered in substitution and those remaining on deposit must equal in value 120% of the amount of bonds then outstanding. The Southern Pacific Company offered to prove that shares of stock forming part of the pledged securities had depreciated in value and that at the present time they did not equal in value the last appraised value of such securities and that in order to withdraw the stock of the Rail- 1531 1532

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Petition for Rehearing.

road Company it would have to substitute securities in appraised value not only equal to the former appraised value of the Railroad Company's stock to be withdrawn but also additional securities to make up the depreciation in value of the remaining collateral.

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The record also shows that witnesses who were conversant with the reorganization have died and that records of the Southern Pacific Company which would contain data with reference to the reorganization have been destroyed.

While the Southern Pacific Company has not been called upon to make good upon its guaranty of the bonds, it certainly assumed a liability and to the extent thereof changed its position.

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In making such guaranties the Southern Pacific Company could not have been acting as trustee for the minority stockholders. Hence the terms of the plan of reorganization, which plan is conceded to be fair and legal, did not admit of the constructive trust theory at time of the acquisition of the property by the Southern Pacific Company. Can it be that the constructive trust theory can be held in abeyance until the lapse of years determines whether or not contingent liabilities will ever become actual?

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III.

The majority opinion of the Court states that the Court below was right "in requiring the stock to be delivered in specie."

In securing a right to a full share in all the benefits which the Southern Pacific Company obtained and escaping all the losses of that Company, complainants have secured a very

Petition for Rehearing.

1537

liberal measure of equitable relief, and should not oppose a correspondingly liberal consideration of the equities of the Southern Pacific Company, namely, the circumstances and conditions which make a delivery of the stock in specie a much greater burden and hardship than payment to complainants of the full money value thereof.

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Attention has already been called to the French Loan and the rights of the bondholders thereunder, which makes the delivery of the stock in specie (if possible at all) peculiarly burdensome, entailing sacrifices beyond the value of the stock.

There is still a greater hardship and burden involved in the delivery of the stock in kind. The Houston and Texas Central Railroad Company now forms an important part of the Southern Pacific system. It was acquired for that purpose. It has been developed and managed for twenty-five years as a part of an interdependent system. It has naturally been adjusted as a component part of the system—a system held together and operated through stock ownership by the Southern Pacific. Its value to the Southern Pacific and its value as a part of the system is due in large measure to the ownership by the Southern Pacific of all, not a majority, of its stock, in virtue of which it can play its proper and designed role as one of the system lines. The Southern Pacific system will be disrupted, so far as it depends upon the Houston & Texas Central Railroad Company, by the introduction of a large minority interest through a decree for the delivery of the stock

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Petition for Rehearing.

in specie. Economics which have been brought about and efficiency which has been made possible by the operation of the Houston and Texas Central Railroad Company in connection with other railroads, under a common ownership, will be interfered with and in large measure destroyed by the creation of a large minority interest. During all the time that the situation was being created and money was being spent on the Houston and Texas Central Railroad Company and joint depots and other facilities arranged for under the belief that it could be operated like other system lines, and until July, 1913, the minority stockholders were exerting rights which could only result in a money judgment and no claim whatever was made for possession of the stock.

1543 To show that this question was considered but not decided, by the District Court, attention is called to the fact that when the Southern Pacific Company applied in the Court below to be relieved of the provisions of the decree directing the physical delivery of the stock, the order which was entered on that motion dated the 18th day of November, 1916, provided as follows:

1544 "Further Ordered, that the motion of the defendant to fix an alternate value in place of the physical delivery of the stock is denied for the present, that is (1) pending the taking of an appeal with application for supersedeas or stay; or (2) unless the defendant asks to proceed under the decree and waives his right to appeal; or

Petition for Rehearing.

1545

(3) until this Court without regard to the question of appeal by the defendant proceeds at the foot of the decree to make further order to carry it into effect" (fol. 1368).

From the provisions of this order it is apparent that the learned District Judge himself was not satisfied that the provision of the decree with reference to the physical delivery of the stock should be actually carried out and by his order be reserved to the defendant the right to bring such question up in the future and to have it then determined. 1546

The statement in the majority opinion of this Court will nullify the provisions of this order of November 18, 1916, without giving the defendant the opportunity reserved to it by the District Court to have the matter inquired into and then determined. 1547

No opportunity has been afforded it to present its evidence on this point.

IV.

The opinion of this court is entirely silent as to the result which is accomplished by the carrying out of the decree, viz: The stockholders are given the same right in the mortgaged property that they had prior to the foreclosure decree without payment of the floating debt creditors, whose claims have been entirely cut off. By treating the Southern Pacific Company as acquiring the property as a majority stockholder and as Trustee for the minority stock- 1548

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Petition for Rehearing.

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holders, a construction is given to the plan of reorganization which makes it illegal as a violation of the rights of the floating debt creditors. If the plan had expressly provided what the decree of this court makes it mean, it could have been successfully attacked at the start by floating debt creditors, or they could have made the stockholders contribute enough to pay the floating debt (See *Kansas City Railway Co. v. Guardian Trust Co.*, 240 U. S., 166, and *Northern Pacific v. Ry. Co.*, 228 U. S., 482). Hence at the time of the sale the minority stockholders could not lawfully have acquired the stock without paying their *pro rata* of the floating debt. How do they escape that liability now? Simply because the court has cast their burden on the Southern Pacific Company. It does this by refusing to recognize the identity between the Morgan Company and the Southern Pacific Company when the debt due the Morgan Company is concerned while treating the two companies as identical when stockownership is in question.

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The point we desire to make is that if a plan of reorganization is capable of two constructions, that construction should be adopted which would make it legal rather than one which would be a fraud upon the creditors. The other point is that on the principle that one who seeks equity must do equity, the court, when it construes the plan of reorganization as it has done should see to it that such construction should be applied so as to avoid consequences either

Petition for Rehearing.

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*unjust to one of the parties or contrary to the
policy of the law.*

Respectfully Submitted,

SOUTHERN PACIFIC COMPANY,

By JOLNE, LARKIN & RATHBONE,
its Solicitors.

ARTHUR H. VAN BRUNT,
LEWIS H. FREEDMAN,
Of Counsel.

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I hereby certify that I have examined the
foregoing motion and in my opinion the motion
is well founded and the prayer of the defend-
ant for a rehearing should be granted by this
Court.

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LEWIS H. FREEDMAN,
Counsel for Defendant-Appellant.

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Order for Mandate.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 12th day of July, one thousand nine hundred and

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seventeen.

Present—HON. HENRY G. WARD,
HON. HENRY WADE ROGERS,
HON. CHARLES M. HOUGH,
Circuit Judges.

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HENRY L. BOGERT, *et al.*, as Ex-
ecutors, etc.,
Complainants-Appellees,

v.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant.

1560 Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the decree

Order for Mandate.

1561

of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.

[Endorsed:—United States Circuit Court of Appeals, Second Circuit.—H. L. Bogert *v.* Southern Pacific Co.—Order for Mandate. —United States Circuit Court of Appeals, Second Circuit.—Filed Aug. 25, 1917.—William Parkin, Clerk.

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Order Denying Petition.

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, held at the Court Rooms in the Post Office Building, City of New York, on the 4th day of September, 1917.

1566 Present—HON. HENRY G. WARD,
HON. HENRY WADE ROGERS,
HON. CHARLES M. HOUGH,
Circuit Judges.

HENRY L. BOGERT, *et al.*, as Ex-
ecutors, etc.,
Complainants-Appellees,

1567

v.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,
Upon consideration thereof it is

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ORDERED, that said petition be and hereby is denied.

H. G. WARD.

Clerk's Certificate.

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UNITED STATES OF AMERICA, }
 Southern District of New York, } ss.:

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 512 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Henry L. Bogert, *et al.*, as Executors, etc., against Southern Pacific Company, as the same remain of record and on file in my office. 1570

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 22nd day of November, in the year of our Lord One Thousand Nine Hundred and Seventeen, and of the Independence of the said United States the One Hundred and Forty-second. 1571

[SEAL]

WM. PARKIN,
 Clerk.

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UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Southern Pacific Company is appellant, and Henry L. Bogert, Townsend Lawrence and Anita Lawrence, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, etc., et al., are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Eastern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twelfth day of January, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26,240. Supreme Court of the United States. No. 773. October Term, 1917. Southern Pacific Company vs. Henry L. Bogert et al., etc., et al. Writ of Certiorari.

United States Circuit Court of Appeals for the Second Circuit.

HENRY L. BOGERT et al., Complainants-Respondents,
against
SOUTHERN PACIFIC COMPANY, Defendant-Appellant.

It is hereby stipulated that the record filed in this cause in the Supreme Court of the United States as an exhibit to the Petition of the Defendant-Appellant for a Writ of Certiorari filed in the said court on the 24th day of November, 1917, shall constitute the return to the writ of certiorari granted by the said court in this cause the 7th day of January, 1918.

And it is further hereby stipulated that the one copy of each of defendant's Exhibits B, C, D and E and of complainant's Exhibit 14, which were lodged with the Clerk of the said Court in connection with the said Petition, and which are now in the custody of the said Clerk, may, (with the consent of the said Court) be submitted upon the argument of this cause before that Court and referred to and quoted from upon the argument as though the said exhibits had been printed in the return to the said writ of certiorari, all in the same manner as the same were used upon the argument of this cause in the United States Circuit Court of Appeals for the Second District.

And it is further stipulated that defendant's Exhibit F cannot be produced; that the same was a copy of the record on file in the Supreme Court of the United States under the title of Bogert vs. Southern Pacific Company, 228 U. S., 137, and that the said record may, (with the consent of the Court) be referred to and quoted from upon the argument before the said Court as though the same constituted defendant's said Exhibit F and had been printed in full in the said return to the said writ of certiorari.

And it is further stipulated that (if the said Court shall so desire) three copies of the Twenty-ninth Annual Report

of the Southern Pacific Company and all of the original certificates of the stock of Houston & Texas Central Railway Company in the possession of the complainants may be submitted to the said Court and referred to and quoted from upon the argument.

Dated April 11, 1918.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant-App'l't.
 DILLENHORFER, GERBER & JAMES,
Solicitors for Complainant-Resp't.
 GEORGE GORDON BATTLE,
Solicitors for Intervenors, Rosenfeld,
Cohn and Gernsheim.

[Endorsed:] U. S. Circuit Court of Appeals, Second Circuit. Henry L. Bogert et al., Complainants-Respondents, against Southern Pacific Company, Defendant-Appellant. Copy. Stipulation as to return to writ and as to exhibits. Joline, Larkin & Rathbone, solicitors for Def't-App'l't, 54 Wall Street, New York City.

To the Honorable the Supreme Court of the United States,
 Greeting:—

The record and all proceedings whereof mention is within made, having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereunto annexed and certified as the return to the said writ of certiorari issued herein.

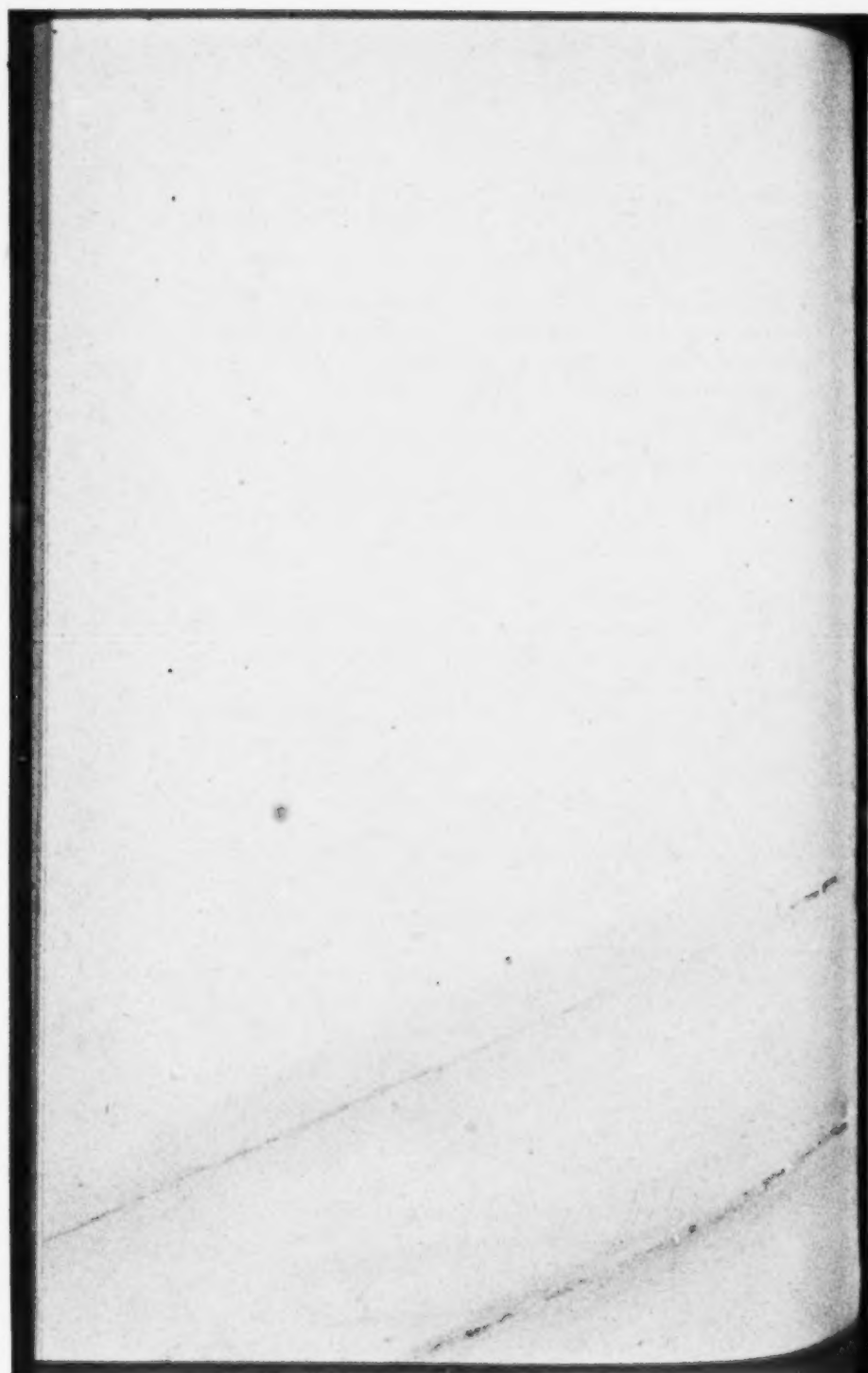
Dated, New York, April 19th, 1918.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court
of Appeals for the Second Circuit.

[Endorsed:] 773/26,240. United States Circuit Court of Appeals, Second Circuit. Henry L. Bogert v. Southern Pacific Co. Return to Certiorari.

[Endorsed:] File No. 26,240. Supreme Court U. S. October term, 1917. Term No. 773. Southern Pacific Company, petitioner, vs. Henry L. Bogert et al., etc., et al. Writ of certiorari and return. Filed May 3, 1918.



No. 7305

FILED

NOV 24 1917

JAMES D. MAHER;
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM. A. D. 1917.

In the Matter of the Application of the
SOUTHERN PACIFIC COMPANY for a writ of
certiorari under Section 240 of the Judicial
Code—SOUTHERN PACIFIC COMPANY,
Petitioner-Defendant,
(*Defendant-Appellant*),
against

HENRY L. BOGERT, TOWNSEND LAWRENCE
and ANITA LAWRENCE, as Executors under
the Last Will and Testament of Walter B.
Lawrence, deceased, suing on behalf of them-
selves and other stockholders of the Houston
& Texas Central Railway Company similarly
situated who may come in and contribute to
the expenses of this action, HENRY FITCH
and RUSSELL H. LANDALE, as Survivors of
Committee of Stockholders, SARA ROSEN-
FELD and ROSETTA COHN, as Executrices
under the Last Will and Testament of Charles
Minzensheimer, and MICHAEL GERNSHEIM,
Respondents,
(*Complainants-Appellees*).

On Petition for Writ of
Certiorari Directed
to the United States
Circuit Court of Ap-
peals for the Second
Circuit.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

LEWIS H. FREEDMAN,
ARTHUR H. VAN BRUNT,
Counsel for Petitioners.

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, A. D. 1917.

In the Matter of the Application of
the SOUTHERN PACIFIC COMPANY
for a writ of *certiorari* under Sec-
tion 240 of the Judicial Code—
SOUTHERN PACIFIC COMPANY,
Petitioner-Defendant,
(Defendant-Appellant),

AGAINST

HENRY L. BOGERT, TOWNSEND LAW-
RENCE and ANITA LAWRENCE, as
Executors under the Last Will
and Testament of Walter B.
Lawrence, deceased, suing on
behalf of themselves and other
stockholders of the Houston &
Texas Central Railway Company
similarly situated who may come
in and contribute to the expenses
of this action, HENRY FITCH and
RUSSELL H. LANDALE, as Survivors
of Committee of Stockholders,
SARA ROSENFELD and ROSETTA
COHN, as Executrices under the
Last Will and Testament of

On Petition for Writ of
Certiorari Directed
to the United States
Circuit Court of Ap-
peals for the Second
Circuit.

Charles Minzensheimer, and
 MICHAEL GERNSEIM,
 Respondents,
 (Complainants-Appellees).

**PETITION FOR WRIT OF CERTIORARI AND
 BRIEF IN SUPPORT THEREOF.**

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES
 AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE
 UNITED STATES.

The petition of the Southern Pacific Company for a writ of *certiorari* directed to the United States Circuit Court of Appeals for the Second Circuit, and ordering that the records and exhibits in a certain cause be certified to this Honorable Court for final reading and determination under the provision of Section 240 of the Judicial Code, the said cause being entitled as follows in said Circuit Court of Appeals :

“ HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston and Texas Central Railway Company similiarly situated who may come in and contribute to the expenses of this action, HENRY FITCH and RUSSELL H. LANDALE, as Survivors of Committee of stockholders, SARA ROSENFELD and ROSETTA COHN, as Executrices under the Last Will and Testament of Charles Minzensheimer, and MICHAEL GERNSEIM,

Complainants-Appellees,

AGAINST

SOUTHERN PACIFIC COMPANY,
 Defendant-Appellant.”

Your petitioner, Southern Pacific Company, respectfully shows and petitions this Honorable Court as follows :

FIRST. The questions presented by the decision of the Circuit Court of Appeals are not limited to the case at bar, but are of universal interest and affect generally all reorganizations. Briefly these questions are :

(a) Should a plan of reorganization which is susceptible of two interpretations be so construed in a suit brought by minority stockholders, so that the carrying out of said plan and the compliance with the decree entered in said suit, result in restoring the property of a corporation to its bondholders and stockholders, entirely eliminating the creditors, none of whose claims are paid ? and

(b) Is the majority stockholder of a corporation which itself owns a majority of the stock of a second corporation when the only evidence of control and dictation is the election of directors, a trustee for the minority stockholders of the second corporation ?

SECOND. The effect of the decree entered in this suit which has been affirmed by the Circuit Court of Appeals for the Second Circuit so construes the provisions of the agreement pursuant to which the Houston & Texas Central Railway Company was reorganized in 1888 so as to bring about the result that after said reorganization had been perfected and said decree has been fully performed, said railway property is restored to the bondholders and stockholders without any payment having been made to the creditors and the property and assets of said railway have been freed entirely from the claims of its creditors.

THIRD. This suit was instituted in July, 1913. The complainants are minority stockholders of the Houston and Texas Central *Railway* Company, which was sold out at foreclosure sale in 1888. The defendant, Southern Pacific Company, is the owner of all the stock of the Houston and Texas Central *Railroad* Company, a corporation formed to take over the

property acquired by the Southern Pacific Company through the above mentioned foreclosure sale, the property having been so acquired in accordance with the terms of a plan of reorganization.

The relief sought was for an accounting, in which the petitioner be required to account for all stocks, moneys, property, benefits and advantages which it received because of the carrying out of the reorganization agreement and that on such accounting the petitioner be credited with such moneys as it may have paid on account of the guarantees and expenses of carrying out the said reorganization and be given all other proper credits. The relief accorded is the delivery in kind to complainants of a *pro rata* of the stock of the new corporation in proportion to their holdings of stock in the new company. This relief is essentially based on the theory that, in acquiring the property in question, the Southern Pacific Company acted in the character of a majority stockholder and must be considered as a constructive trustee for complainants. The position of the Southern Pacific Company is that it was not at the time a stockholder of the sold-out company, that if it can be considered as possessing the character of a stockholder (because it was the stockholder of a stockholder of the sold-out company) it cannot under the circumstances be regarded as having purchased in the character of a stockholder, and that the effect of so regarding it is to convert an admittedly fair and reasonable plan of reorganization into an illegal scheme for shutting out unsecured creditors and to operate a great injustice upon it for the benefit of minority stockholders who refused to come in and participate in the sale upon terms concededly fair and reasonable.

FOURTH. The facts which are somewhat complicated are briefly as follows:

The Houston & Texas Central Railway Company (hereafter called Railway Company) was a corporation of the State

of Texas originally incorporated in 1856 under name of Galveston & Red River Railway Company. In 1877 one Charles Morgan transferred his very considerable railway interests in Texas and Louisiana, including a majority of the stock of the Railway Company to Morgan's Louisiana & Texas Railroad and Steamship Company (hereafter called Morgan Company). In 1883 a majority of the stock of the Morgan Company was purchased by the Southern Development Company, which in turn sold such stock to Southern Pacific Company in 1885. The Morgan Company at the time of such purchase owned not only a majority of the stock of the Railway Company, but also a majority of the stock of a number of other railroad lines in Texas and Louisiana essential for the proper operation of a transcontinental route and also various steamship lines. The petitioner, Southern Pacific Company, therefore, never was a stockholder of Railway Company, though it controlled same by reason of its ownership of a majority of the stock of the Morgan Company which in turn owned a majority of stock of the Railway Company.

The Railway Company had an authorized capital stock of \$10,000,000, of which \$7,726,900 was issued and outstanding.

In 1885 the property of the Railway Company was subject to seven mortgages securing issues of bonds, two of which mortgages covered all the lines of railway and all land grants and other property of the Railway Company.

Up to 1885 all interest on bonds was paid though there were large operating deficiencies which were taken care of by loans from the Morgan Company, Southern Development Company and others. The floating debt then amounted to about \$3,000,000. In 1889 judgment in the sum of \$1,795,570.81 on account of its advances to Railway Company was obtained by the Morgan Company against the Railway Company, execution issued thereon, which was returned "*Nulla Bona*" and such judgment remains unsatisfied and the claim unpaid.

In January 1885 default was made in payment of interest on certain of the mortgages which contained no provision for acceleration of the maturity of the principal upon default and provided that in case of default the land grants covered should be sold prior to the railroad. Thereafter and in February of that year, actions were brought by the trustees for the purpose of enforcing the trusts in the said mortgages. Immediately thereafter Southern Development Company filed a creditors' bill and obtained the appointment of receivers, who took possession of the road. Early in 1886 foreclosure bills were filed by the trustees of the three mortgages which had already filed the bills mentioned above. In May 1886 the three foreclosure actions were consolidated and receivers were appointed. Answers thereto were filed, the trustees claiming conflicting liens, and the Railway Company asserting by answer that the principal had not and could not be matured and that the railroad could not be sold until the land grants had been disposed of. The issues raised by such answers necessitated the taking of testimony and this was not completed until the Spring of 1888.

In the meantime the property was being operated at a loss, and all parties interested appreciated that some arrangement was necessary to terminate the impossible situation. Consequently counsel for the various issues of bonds and the chief creditors, viz., the Morgan Company and the Southern Development Company (counsel for which was also general counsel for the Southern Pacific Company), conferred, and after nearly two years of negotiations a plan of reorganization was promulgated under date of December 20, 1887. This plan by April, 1888, had been assented to by a very large percentage of the outstanding bonds.

The plan took the form of an agreement between the holders of the various outstanding issues of bonds, Central Trust Company of New York and Southern Pacific Company, and recited that the Central Trust Company was to perform

the duties now usually taken care of by Reorganization Managers and that Southern Pacific Company "was interested in connecting roads in conjunction with which it desired the railway to be operated."

The main features of the plan were that all existing mortgages (with the possible exception of the Waco and Northwestern First Mortgage) should be foreclosed, and a new company organized; that the Central Trust Company of New York should act as purchasing trustee and perform certain duties imposed upon it by the agreement; that the First Mortgage bondholders should accept new five per cent. bonds for the same amount of old seven per cent. Firsts, and receive a bonus of fifty dollars per bond in consideration of the reduction of interest rate; that the Consolidated Mortgage bondholders should accept new six per cent. bonds for a like amount of old eight per cents. and fund their past due interest at three-fourths of its face amount in debenture bonds bearing six per cent. interest; that the General Mortgage bondholders should accept four per cent. bonds in lieu of their sixes, and fund their past due interest at two-thirds of its face amount in four per cent. debentures, the priorities of the several new mortgages to be substantially the same as those of the old. The payment of the interest upon the new bonds and of the principal and interest of the new debentures was to be guaranteed by the Southern Pacific Company.

The advantages of this reorganization to the old company and to all of its stockholders are apparent.

By this arrangement the Railway Company was released from the payment of nearly \$500,000 interest past due for ten years, the payment of some \$1,100,000 more of past due interest was postponed, and its future interest charges were reduced more than \$250,000 a year, and the time of payment of the principal of the \$8,064,000 first mortgage bonds was postponed from July 1, 1891, to July 1, 1937.

A concise statement of the benefits accruing to the stock-

holders by reason of the plan is contained in Judge PARDEE's opinion in the Carey case, hereinafter mentioned, in 45 Fed. Rep., 438, on page 443, as follows :

" The arrangement provided by the reorganization agreement seems to have been the best possible for all the creditors of the defendant company, also the best for the company and the stockholders—best for the stockholders as it provides for refunding the bonded debt on longer time at a reduced rate of interest and allows each stockholder to retain his stock and his interest in the company, its railway and lands, upon paying his *pro rata* share of the floating indebtedness and the expenses of the reorganization. A foreclosure and sale for the payment of interest would have closed out all the interest of the stockholders in the company. This result was avoided by the reorganization. Without payment of the floating indebtedness the stockholders could not hope to retain any interest in the company and this floating indebtedness is practically all they were required to pay."

While the stockholders were not parties to the reorganization agreement, provision was made for their benefit whereby each and everyone of them—minority as well as majority—might receive his proportion of the stock of the new company (which was to be \$10,000,000) upon contributing his proportionate share of (a) the expenses of reorganization, (b) the floating debt of the company and (c) the matured and unfunded interest on the bonded debt.

That this arrangement was fair and equitable appears from an analysis of it.

There were two classes of claims (other than principal of bonds) which had precedence over the stock :

(a) Matured and maturing interest on the bonded debt, except so far as agreed to be funded into debentures.

(b) The floating debt.

Both of these were present debts which had to be met and paid or the stock would necessarily be rendered utterly valueless. The stockholders were not called upon to pay any principal of the outstanding bonds.

It was provided that stockholders should have the first and primary right, upon paying *pro rata* the above mentioned two classes of debts ahead of the stock and the reorganization expenses (the amount of which was to be determined by Central Trust Company by methods set forth in the plan) to take the stock in the new company *pro rata*, the capital stock to be outstanding being increased from \$7,726,900 to \$10,000,000, and the stockholders taking their ratably increased proportion of the new stock.

If and so far as the stockholders should not see fit to exercise this privilege, the floating debt creditors, who were next in order, upon paying *pro rata* the first class of matured debts and the reorganization expenses, should be entitled to their *pro rata* share of the stock of the new company.

If and so far as both the stockholders and the floating debt creditors refused to redeem the stock of the new company by payment of the sums necessary to cancel the indebtedness ahead of their respective interests, provision was made to the effect that the Southern Pacific Company might acquire said stock upon payment of the expenses of the reorganization, and should the Southern Pacific Company refuse to make such payments the Central Trust Company was to offer said stock for sale generally in the market. The Southern Pacific Company also agreed under the plan of reorganization to guarantee the interest on the new bonds and the principal of and interest on the debentures representing the funding of matured and unpaid interest.

Under the plan of reorganization the Southern Pacific Company could acquire the stock of the new company only after both the floating debt creditors and stockholders of the

old company had refused to avail themselves of the provisions for their benefit.

With the matters in this situation notice was given that application would be made in April, 1888, for a decree of foreclosure and sale in the consolidated suit. In order that a decree might be taken upon all mortgages, bills were filed to foreclose the mortgages on which no suits had been begun prior to the giving of such notice. On May 4, 1888, a decree of foreclosure and sale was entered.

Respondents insist that this decree was a consent decree and that the active co-operation of Southern Pacific Company, which owned a majority of the stock of the Morgan Company which in turn owned a majority of the stock of the Railway Company, was necessary to overcome the defenses contained in the answers of the Railway Company. An examination of the record will show that the complainants in the foreclosure action were absolutely entitled to decrees at that time regardless of these answers, and Judge PARDEE, in the case of *Carey vs. The Houston & Texas Central Railway Company*, 52 Fed., 671, hereinafter referred to so held. But as a matter of fact the answers had performed their functions in delaying the entry of a decree under which all of the property of the Railway Company could be held together until a comprehensive plan of reorganization had been worked out. Sale was had November 8, 1888, and the property was bought on behalf of the parties interested in having a reorganization carried out.

Meantime the Central Trust Company had given notice under the provisions of the plan that in order to raise the amount necessary to take care of prior obligations so as to entitle stockholders to their *pro rata* of the stock of the new company, they would have to pay \$73 per share. The assessment in the abstract seems large but it must be remembered that the capitalization of the Railway was very small for a railroad of

such length and there was likewise a large floating debt to be taken care of. In litigations hereinafter mentioned it was held that because this assessment had not been fixed by the directors of the Trust Company it was not its act as required by the plan. In consequence, a new determination was made by the Central Trust Company and the amount fixed at \$71.40 per share, the difference being occasioned by adjustment of interest. This determination has been upheld by all courts.

No stockholder or creditor availed himself of the rights given under the plan and accordingly the Southern Pacific Company was given the opportunity of acquiring the stock of the new company by accepting the provisions of the plan, which it did. It paid on account of reorganization expenses all the cash requirements of the plan—\$2,602,615.77—and guaranteed the new bonds as required by the plan. Having complied fully with the terms and provisions of the reorganization agreement which entitled it as *banker or underwriter* to the stock in the New Company, the \$10,000,000 of such stock was issued to the Southern Pacific Co. It is this stock or a portion of it which the decree directs to be turned over to the complainants, who had failed to avail themselves of the right afforded them by the plan of organization, and impresses said stock with a trust in their favor, although all of their rights in and to the property and assets of the old company were cut off by the decree of foreclosure and sale which has been declared valid and in no way tainted with fraud.

Thereupon and pending the litigations hereinafter mentioned the Houston & Texas Central Railroad Company was incorporated and the purchasers at the foreclosure sale conveyed the railway to it.

Immediately after the announcement of the assessment, stockholders commenced various suits.

(1) In September, 1889, Michael Gernsheim and others began suit in Supreme Court for New York County on behalf

of themselves and of others similarly situated to vacate the decree of foreclosure, and to restrain the carrying out of the reorganization agreement. On a motion for a temporary injunction, Mr. Justice PATTERSON held that the court had no power to review or to vacate the decree, but that upon the question whether the so-called assessment upon the stock was excessive, the plaintiff had the right to be heard, and he, therefore, granted an injunction, restraining delivery of the new stock pending the trial of the action (*Gernsheim vs. Olcott*, 7 N. Y. Supplement, 872). The defendants appealed to the General Term, and, thereupon, the order was reversed, the Court holding that Justice PATTERSON was correct in his decision that the Supreme Court could not review or vacate the foreclosure decree, but that he was in error in deciding that the plaintiff could litigate in that action the question as to the amount of the so-called assessment (*Gernsheim vs. Olcott*, 31 N. Y. State Rep., 321).

Upon trial of the issues in this case, the Court at Special Term held that the so-called assessment had not been regularly made because the Trust Company had delegated its functions in that regard to certain of its officers and employees.

It will be observed that the declaration of the amount which the stockholders were required to pay as a condition of receiving stock of the new company was in no sense an "assessment". It was an ascertainment of a definite sum, viz., the debts to be paid. An "assessment" is arbitrary.

Thereafter a careful inquiry was made by the Trust Company, which resulted in a declaration that the amount required was equivalent to 71.4 per cent.

Gernsheim and associates then began another suit and applied for a new injunction *pendente lite*, but the application was denied and such denial affirmed on appeal (*Gernsheim vs. Central Trust Co.*, 40 N. Y. State Rep., 967; 41 N. Y. State Reporter, 973).

(2) After the failure of the Gernsheim suits an action was begun in 1891 by Cornelius MacArdell on behalf of a committee representing stockholders in the Supreme Court of the State of New York. This suit appeared on the calendar early in 1892, but it was not moved for trial until March, 1902, and upon such trial judgment was given for the defendants. The Supreme Court at Special Term in its decision dismissing the complaint upon the merits placed the same upon the grounds (1) that the suit was in effect brought to set aside or avoid a valid decree of foreclosure and sale, and to have it determined that the purchasers held the property as trustees for the stockholders of the mortgagor, and that the decree and sale thereunder were final and conclusive as to the plaintiffs; (2) that the decree was made and the proceedings thereunder were had without fraud, collusion or wrongful conduct on the part of any of the defendants, and that the title was not subject to any trust for the benefit of stockholders of the old company. An appeal was taken from such judgment to the Appellate Division, and the judgment affirmed, and from such affirmance a further appeal was taken to the Court of Appeals, which resulted in an affirmance of the judgment by a divided court in October, 1907 (*MacArdell vs. Olcott*, 189 N. Y., 376).

(3) In 1889 Stephen W. Carey and other members of the stockholders protective committee, filed a bill in United States Circuit Court for the Eastern District of Texas on behalf of themselves and all others similarly situated. In the amended bill of complaint it was alleged among other things that the decree of foreclosure and sale theretofore given in the foreclosure action in Texas, bearing date May 4th, 1888, was fraudulent and void, that the reorganization agreement was a fraud upon the stockholders of the Houston and Texas Central Railway Company, and the amount fixed by the Central Trust Company as payable by the stockholders of the old Railway Company in order to entitle them to acquire stock of the new Railroad Company was

wrongfully and fraudulently contrived and made out as part of a scheme and plan for obtaining possession of the old railway company. The amended bill prayed, among other things, that said decree of foreclosure and sale and the sale thereunder of the property covered by the mortgages, being all the property of the Houston and Texas Central Railway Company, be vacated and set aside; that the defendants in said suit be enjoined from delivering or disposing of any of the bonds or stock of the new railroad company provided for in the reorganization agreement. Their motion for an injunction *pendente lite* was heard and denied (*Carey vs. H. & T. C. Railway Co.*, 45 Fed. Rep., 438). The cause was afterwards heard on the pleadings and proofs, and the bill was dismissed on the merits (*Carey vs. H. & T. C. Railway Co.*, 52 Fed. Rep., 671). Complainants took two appeals from this decision, one to the Supreme Court of the United States, and one to the United States Circuit Court of Appeals for the Fifth Circuit. The first mentioned appeal was dismissed (*Carey vs. H. & T. C. Ry. Co.*, 150 U. S., 170). The appeal to the Circuit Court of Appeals was heard, and on June 5, 1894, the decree was affirmed (*Carey vs. H. & T. C. Ry. Co.*, 9 U. S. Circuit Ct. of Appeals Reports, 687). Complainants in the Carey suit appealed to the Supreme Court of the United States, and their appeal was dismissed March 2, 1896 (*Carey vs. H. & T. C. Ry. Co.*, 161 U. S., 115).

(4) After the decision of the Court of Appeals in the MacArdell case and in 1908 Walter B. Lawrence, who was a member of the stockholders' committee and a depositor therewith, brought an action in the Supreme Court of Nassau County against the Southern Pacific Company, Olcott, purchaser of the property at the foreclosure sale, and three trust companies to whom Olcott had executed conveyances of his interest in the property for the purpose of affording further security for the mortgages executed by the new railroad company pursuant to the reorganization plan, to wit, Central

Trust Company, Farmers' Loan and Trust Company and the Metropolitan Trust Company, in which it was attempted to set up (1) a cause of action against the Southern Pacific Company for an accounting and (2) a cause of action against Olcott for a reconveyance of the lands purchased by him at the foreclosure sale. Mr. Olcott died during the pendency of this action and it being impossible to revive the same against his executors, a motion was made to dismiss the complaint. This was denied upon the ground that the two separate causes of action set forth above were embraced in the complaint and that, though no relief could be had in regard to the second in the absence of Mr. Olcott's representatives, the former could be disposed of without their presence (*Lawrence Record, Exhibit F*, pp. 61-65).

Prior to Mr. Olcott's death a plea had been interposed, setting up that the Houston and Texas Central Railway Company, joined as a party, but which had not been served and was not before the court, was an indispensable party. This plea was heard on an agreed statement of facts and the United States District Court sustained the same and made an order *nisi* directing, that unless the Houston and Texas Central Railway Company appear or be brought in within a time fixed therein, the bill be dismissed. Complainants failing to serve or to procure the appearance of the Houston and Texas Central Railway Company within the time so limited, the bill was dismissed (*Lawrence vs. Southern Pacific Co.*, 180 Fed. Rep., 842). From the decree dismissing the bill an appeal was taken to the Supreme Court of the United States, which court, after hearing the argument, dismissed the appeal for want of jurisdiction. During the pendency of the appeal in the Supreme Court the plaintiff Lawrence died and the action was revived in the name of his executors (*Bogert vs. Southern Pacific Co.*, 228 U. S., 137).

In none of the foregoing actions was any claim made that physical delivery of the stock of the new company (The

Houston & Texas Central Railroad Company) obtained by the Southern Pacific Company at the time of the reorganization, should be had and it was not until after the commencement of the present suit that such a claim was advanced.

In the present action it is sought to hold Southern Pacific Company as majority stockholder and to impress a trust upon the \$10,000,000 of stock of the new company which it received upon payment by it of \$2,602,615.77 in cash and guaranteeing certain of the bonds of the new company, after stockholders and creditors had refused to avail themselves of the provisions of the plan. Testimony was taken, the court having denied the motion to dismiss and a motion for judgment on the separate defenses pleaded in the answer, and after a hearing on the merits, an interlocutory decree was entered finding that Southern Pacific Company was majority stockholder of the Railway Company and received the \$10,000,000 of stock of the new company as trustee, and that the minority were entitled to their *pro rata* share thereof on payment only of their proportion of the cash put up by the Southern Pacific Company (See 226 Fed. Rep., 500).

While the bill of complaint apparently contemplated only the payment of such sum as to which the complainants upon an accounting would be entitled after crediting the appellant "with the moneys actually paid out in connection with the reorganization agreement" the interlocutory decree directed the physical delivery of shares of stock and fixed as the amount to be credited, only the sums paid out by the Southern Pacific Company in carrying out the reorganization agreement, without crediting it or permitting it to avail itself of the judgment entered against the Railway Company in favor of the Morgan Company and appointed a Special Master "to take testimony and report the amount of dividends and profits received by the defendant Southern Pacific Company upon the common stock of the Houston & Texas Central Railroad Company, to which under this decree the complainants * * *

and the other stockholders who may be brought in as parties plaintiff are entitled".

It appearing that the entire stock of the new company (The Houston and Texas Central Railroad Company) physical delivery of a part of which was thus ordered, had been pledged in 1911—two years before the commencement of this action—to secure the issue of bonds amounting to 250,000,000 francs taken by certain French banks and known as the "French Loan," the Master was also directed to inquire into the facts concerning this pledge. Testimony before the Master tending to show that an attempt to release this stock from the French Loan would by its terms precipitate the maturity of the loan if the banks desired to take such action, or even if this were not the case that to secure possession of such stock Southern Pacific Company would be obliged to pledge additional collateral under the loan of the value of about \$5,000,000 was rejected and exception taken to such rejection. On the coming in of the Master's report, final decree was entered, which directed physical delivery of the stock on payment by the plaintiffs of \$26.026 and interest from February 26, 1891, for each share of stock delivered to them, such amount being the *pro rata* only of the cash actually paid by the Southern Pacific Company for reorganization expenses.

Thereupon motion was made by the defendant praying to be relieved from the provisions of the decree requiring physical delivery of the stock and that in lien thereof it be allowed to pay its value upon the ground that the hardship on the defendant was incommensurate with the advantages to the plaintiffs. The District Court did not dispose of this motion and the order thereon contained the following reservations :

"Further Ordered, that the motion of the defendant to fix an alternate value in place of the physical delivery of the stock is denied for the present, that is (1) pending the taking of an appeal with application for supersedeas or stay; or (2) unless the defendant asks

to proceed under the decree and waives his right to appeal ; or (3) until this Court without regard to the question of appeal by the defendant proceeds at the foot of the decree to make further order to carry it into effect (fol. 1368)."

From the final decree the defendant duly assigned error and appealed to the Circuit Court of Appeals, which affirmed the judgment of the District Court (244 Fed. Rep., 61). Judge HUGH, however, in his opinion stated that inasmuch as the Southern Pacific Company had been held as a majority stockholder of the Railway Company, the title to the stock of which was in its subsidiary, the Morgan Company, it was on principles of equity entitled to reimbursement for what it relinquished in permitting the foreclosure decree to be entered and thus wipe out the debt of the Morgan Company evidenced by the judgment hereinbefore mentioned. He stated that in his opinion the Court below had committed error because it refused to consider the matter at all.

In regard to the defense of laches, after pointing out that Federal Courts of equity are not bound by the State Statutes of Limitation, he said as follows :

" But in principle this court has adhered firmly to the doctrine that its equity jurisdiction is not subject to limitations of time or other matters created by State laws (Kirby v. Lake Shore, &c., R. R., 120 U. S., at 138, and see Hubbard v. Manhattan Trust Co., 87 F. R., 51). Yet where the jurisdiction is concurrent as between law and equity, the Chancellor is bound to apply the Statute (Hall v. Law, 102 U. S., at p. 466). In other cases (he) acts only by analogy, and not in obedience to the statutes.

" It follows that the present decision holds in substance that there is no remedy at law for these plaintiffs, that equity is the only jurisdiction for them, and that twenty-five years of failure to discover an always existing cause of action, based on facts of almost public

notoriety—does not constitute laches, in the absence of silence, inaction or acquiescence by plaintiffs; or loss of advantages or change of situation caused or contributed to by plaintiffs—on defendant's part.

"In this holding I concur, extreme as the facts are—on the assumption that the case is not one of concurrent jurisdiction. I make that assumption only because the parties have assumed it."

Motion was made to the Circuit Court of Appeals for a rehearing, which was denied without opinion.

FIFTH. The decree directs the physical delivery of a *pro rata* number of shares of stock to the complainants. A compliance with this provision puts the complainants in a better position than they were in before the foreclosure and reorganization for the reason that although none of the floating debt creditors have been paid, the complainants are restored to their original stock ownership in the property of the old railway company. A reorganization is thus effected by which the stockholders have profited at the expense of the floating debt creditors.

SIXTH. The decree holds that the Southern Pacific Company acquired the stock of the new railroad company impressed with a trust in favor of the complainants. This result was reached by applying the doctrine that a majority stockholder in a corporation is a trustee for the minority and cannot profit at the expense of the minority. *The Southern Pacific Company never owned any stock of the old railway company.* Such fact is conceded. The Southern Pacific Company owned a majority of the stock of the Morgan Company which in turn owned a majority of the stock of the old railway company. No case has been found, and counsel for the complainants upon the argument in the Circuit Court of Appeals conceded, that none existed, which applies the doctrine of a majority stockholder being trustee for the minority to a state of facts similar to those in the case

at bar. Whether the majority stockholder in a corporation which owns a majority of the stock of a second corporation is a trustee for the minority stockholders of the second corporation directly affects all holding companies and would subject them to obligations and duties which have not been heretofore announced or defined by the courts. This question is one which will affect reorganizations and the financing of corporations generally and is of such importance and gravity that it should be passed upon and determined by this court.

SEVENTH. Although the decree imposes a liability and an obligation upon the Southern Pacific Company as a majority stockholder of the old railway company because of its ownership of a majority of the stock of the Morgan Company, it refuses to permit the Southern Pacific Company to claim any rights on account of moneys due the Morgan Company as evidenced by the judgment entered in favor of the Morgan Company which still remains unpaid. The complainants are restored to their ownership of stock without contributing anything towards the payment of the judgment due the Morgan Company although the Southern Pacific Company has given up its right to be benefitted by the payment of such judgment.

EIGHTH. The Circuit Court of Appeals refused to sustain the defense of laches. No claim was made in any of the numerous suits brought, for the physical delivery of any portion of the stock of the new railroad company acquired by the Southern Pacific Company as underwriter or banker under the plan of reorganization of the old railway company until the present suit which was brought in 1913. The acts complained of in the suit at bar took place in 1888 and 1889. Between 1888 and 1913 various suits were brought all in the interest of the minority stockholders of the old railway, and all upon theories entirely inconsistent with this suit. Prior to the beginning of this suit the French loan had been made. In connection with this loan all

of the stock of the new railroad company acquired by the Southern Pacific Company was pledged and said company covenanted that it was the owner of and had good title to all of said stock. Such pledge was justified, inasmuch as the stock had been delivered to it in 1891 and up to the time of the making of the pledge—1911—no one had ever made any claim to any interest therein. The terms of this French loan subject the Southern Pacific Company to great hardship to effect a release of any of said stock. Furthermore, the old company was an independent line and since its reorganization it has been developed and become a part of the Southern Pacific system so that its value has been enhanced and is due in a large measure to the ownership by the Southern Pacific Company of *all* and not a majority of its stock.

The French loan would not have been made and the new railroad company would not have been developed and would not have become a part of the Southern Pacific system had the claim for the physical delivery of the stock been promptly advanced.

The effect of the decree, which requires the delivery of the stock in kind, is to introduce a large minority interest in an important part of a system of railroads, thus destroying the unity of interest and control upon which the successful operation of the system largely depends.

NINTH. Your petitioner further shows that as a result of the failure on the part of the Circuit Court of Appeals to apply the rule heretofore announced by this Court to the effect that the stockholders cannot profit at the expense of creditors under a plan of reorganization and as a result of applying the doctrine that a majority stockholder is a trustee for the minority, an important question not only to the parties in this proceeding but to corporations and reorganizations generally, is involved in doubt and uncertainty which can be settled alone by this Court.

TENTH. The objectionable features of the decree are :

1. It makes the plan of reorganization accomplish the illegal result of shutting out unsecured creditors.

2. It virtually denies to any majority stockholder the right to act otherwise than as a trustee of all the stockholders at a foreclosure sale, even when the other stockholders have rejected an admittedly fair and reasonable plan for their equal participation in the purchase of the property and the majority stockholder is acquiring the property to protect or further interests wholly independent of his stockownership, and incurs obligations as part of the price which the minority stockholders are unable, or at least are unwilling to assume.

3. It permits the minority stockholders to claim a stock interest in the new corporation, when such claim is made for the first time more than 20 years after the transaction was completed, and when such delivery of stock in kind will subject defendant to enormous damages, in addition to the value of the stock.

4. It accomplishes this result among other methods by treating the Southern Pacific Company as identical with the Morgan Company for the purpose of making it a stockholder of the sold-out company and by refusing to identify it with the same company for the purpose of giving it the character of an unsecured creditor. The result is that stock which cost it at least the amount of its cash disbursements, plus a large unsecured debt, is required to be turned over to complainant at the *pro rata* of such cash disbursements without any allowance for the relinquished indebtedness.

5. It injects into the matter of reorganization agreements the element of a constructive trust, based on the purchaser being the stockholder of a stockholder. Considering the great number of reorganization agreements and the vast interests affected thereby, it is of universal interest and importance that the uncertainty and confusion which must result from the decree complained of should be cleared away by a review of this case by this Court.

ELEVENTH. A certified copy of the entire record of said case in the said Circuit Court of Appeals is herewith furnished, attached to and made part of this application and marked Exhibit A, in compliance with Rule 37 of this Honorable Court.

Upon the trial of this cause the defendant introduced in evidence the printed records of certain other causes. These records are ancient, voluminous and out of print, and are known in this cause as defendant's exhibits B, C, D, E and F. Exhibit B is the record in the Carey case, about 1,200 pages; Exhibit C is record in Gernsheim vs. Olcott, about 240 pages; Exhibit D is the record in Gernsheim vs. Central Trust, about 350 pages; Exhibit E is the record in the McArdell case, 2 volumes, about 1,500 pages, and Exhibit F is the record in the Lawrence case, about 100 pages.

Upon the argument of the appeal below the appellate court, by an order filed in this suit, dispensed with the printing of the full number of these Exhibits and heard the appeal on one copy of each thereof (save Exhibit F of which no copy was produced and in which the original record is on file in this court under the title of Bogert vs. Southern Pacific Company, 228 U. S., 137) and on one copy of Complainant's Exhibit 14, an instrument of about 48 pages and known as the French Loan Agreement, and which is also out of print. That court also allowed the use of less than the full number of the Twenty-ninth Annual Report of the Southern Pacific Company.

The petitioner has filed or will file with the clerk of this honorable court in this proceeding one copy of each of the said papers save Exhibit F (which was not used on the appeal below) and of which it does not possess and cannot obtain even one copy.

Your petitioner is advised and believes that the said decree of the United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require said case to be certified to it for its review and determination in

conformity with the provisions of Section 240 of the Judicial Code, said decree being made final in said Circuit Court of Appeals by the provisions of Section 128 of the Judicial Code.

WHEREFORE, your petitioner respectively prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause entitled :

“ HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company similarly situated who may come in and contribute to the expenses of this action, HENRY FITCH and RUSSELL H. LANDALE, as Survivors of Committee of Stockholders, SARA ROSENFELD and ROSETTA COHN, as Executrices under the Last Will and Testament of Charles Minzensheimer and MICHAEL GERNESHEIM,

Complainants-Appellees,

AGAINST

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant.”

to the end that the said cause may be reviewed and determined by this Court as provided by Section 240 of the Judicial Code, or that your petitioner may have such other or further relief in the premises as this Court may deem appropriate and in conformity with said provisions of the Judicial Code and that the said decree of the said Circuit Court of Appeals in the

said cause and every part thereof, may be reversed by this
Honorable Court.

SOUTHERN PACIFIC COMPANY,

By

LEWIS H. FREEDMAN,

ARTHUR H. VAN BRUNT,

Attorneys for said Petitioner.

STATE OF NEW YORK, }
 County of New York, } ss. :

LEWIS H. FREEDMAN, being first sworn on oath, deposes and says that he is one of the attorneys for the petitioner named in the foregoing petition by him subscribed as attorney for such petitioner. That he knows the contents of said petition and that the facts therein stated are true to his knowledge.

LEWIS H. FREEDMAN.

Subscribed and sworn to be-
 fore me this 23rd day of }
 November, A. D. 1917. }

WILLIAM D. TUCKER,
 Notary Public, New York County No. 84.
 New York County Register No. 8048.

We hereby certify that we have examined and read the foregoing petition for writ of *certiorari* and that in our opinion such petition is well founded and should be granted by this Honorable Court and that said petition is not filed for delay.

LEWIS H. FREEDMAN,
 ARTHUR H. VAN BRUNT,
 Counsel for said Petitioner.

November 23rd, 1917.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1917.

In the Matter of the Application of
the Southern Pacific Company
for a writ of *certiorari* under Sec-
tion 240 of the Judicial Code—
SOUTHERN PACIFIC COMPANY,
Petitioner-Defendant,
(Defendant-Appellant),

AGAINST

HENRY L. BOGERT, TOWNSEND
LAWRENCE and ANITA LAWRENCE,
as Executors under the Last Will
and Testament of Walter B. Law-
rence, deceased, suing on behalf
of themselves and other stock-
holders of the Houston & Texas
Central Railway Company simu-
larly situated who may come in
and contribute to the expenses
of this action, HENRY FITCH and
RUSSELL H. LANDALE, as Sur-
vivors of Committee of Stock-
holders, SARA ROSENFELD and
ROSETTA COHN, as Executrices
under the Last Will and Testa-

ment of Charles Minzensheimer,
and MICHAEL GERNSHEIM,
Respondents,
(Complainants-Appellees.)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:—

The statement of the matter involved in the petition, and the general reasons relied on for the allowance of the writ, sufficiently appear in the petition.

We beg to submit in support thereof, the following points for the consideration of the court:

I

A writ of certiorari will be issued in cases where the questions involved are grave and of general importance.

Forsyth vs. Hammond, 166 U. S., 506.

St. Louis, K. C. & U. R. R. Co. vs. Wabash R. R. Co., 217 U. S., 247.

II

A plan of reorganization which prefers stockholders before creditors is invalid.

Kansas City Ry. vs. Guardian Trust Co., 240 U. S., 166.

Northern Pacific Ry. vs. Boyd, 238 U. S., 482.

Louisville Trust Co. vs. Louisville, etc., Ry., 174 U. S., 683.

Mr. Justice LAMAR, in the opinion in the *Boyd* case, stated

" For, if purposely or unintentionally a single creditor was not paid or provided for in the reorganization, he could assert his superior rights against the subordinate interests of the old stockholders in the property transferred to the new company. They were in the position of insolvent debtors, who could not reserve an interest as against creditors. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with the payments of corporate liabilities. *Any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor was invalid*" (Italics ours).

While it is true that the plan of reorganization of the Old Railway Company did provide for the payment of creditors, but only in the event of such payments being made were the stockholders permitted to retain any interest in the property, the decree entered in the suit at bar holds that the *majority stockholder* acquired all of the stock of the New Company and that a *pro rata* share of said stock is impressed with a trust for the benefit of the minority stockholders, and that specific delivery of the stock should be made. No creditors were paid. When the decree has been fully complied with, the result of the reorganization of the Old Railway Company is that the majority and minority stockholders are restored to their ownership of the property, but no creditor has been paid. A plan of reorganization which produces such a result is precisely the kind of a plan pronounced by the Supreme Court to be illegal.

III.

No authority can be found for the extension of the doctrine that a majority stockholder is a trustee for the minority to the case of a corporation which owns a majority of the stock of a second corporation.

The Circuit Court of Appeals cited no authority for the conclusion affirmed by it that the Southern Pacific Company was a trustee for the complainants, minority stockholders of the Old Railway Company, although it did not own a share of stock of the Old Railway Company.

In each of the cases cited by the District Judge in support of the proposition that the Southern Pacific Company was a trustee for the minority stockholders, it appears that the majority stockholder was in control of the property, had in some way mismanaged it and had committed fraud or concealed the true facts or performed some act which resulted in depriving the minority of its rights or had detrimentally affected them.

In *Rothschild vs. Memphis & C. R. Co.*, 113 Fed. Rep., 479, Mr. Justice WANTY there said :

“ If he (majority stockholder) is not in control of the property and does not mismanage it to the prejudice of the minority stockholders, he may purchase, if there be no actual fraud, the property of the corporation at a judicial sale for his own benefit, and he is not accountable to any other stockholder for the property so purchased.”

See *Rogers vs. Nashville C. & St. L. Ry. Co.*, 91 Fed. Rep., 479. Mr. Justice LUTON there said :

“ That this majority of the stock has been used for the purpose of electing a board of directors selected by the majority owner is no cause for complaint.”

This is not the fact in the case at bar. All that was proven was that directors of the Old Railway Company were apparently selected by the Southern Pacific Company, this petitioner. There is no proof that the majority stockholder did or attempted to do anything, and there is even no proof of any corporate action had by the actual majority stockholder. We do not understand the respondents will claim that such a state of facts was proven or that such a claim ever has been or will now be made. No fraud was proven and we do not understand that such a claim is now made. All questions of fraud have been adjudicated against the minority stockholders in the prior litigations (See decisions in suits recited in petition). No concealment is charged and none was proven. Counsel for the respondents sought in the courts below to establish some affirmative action amounting to mismanagement on the part of the petitioner by claiming that a compromise was arrived at and defenses were withdrawn to the foreclosure bills. This contention, which was overruled by Judge PARDEE in the Carey case (45 Fed. Rep., 438) and was affirmed by the Circuit Court of Appeals, overlooks and disregards the following :

(a) The Southern Pacific Co. was not the majority stockholder of the Old Railway Company.

(b) There is no proof that the Southern Pacific Co. or the majority stockholder of the Old Railway Co. exercised their powers in a way detrimental to the minority.

(c) A decree of foreclosure and sale under which all of the property of the Old Railway Co. would have been sold, could have been had and was about to be had even though the reorganization agreement had never been made.

(d) No defenses were withdrawn. Such fact was expressly decided by Judge PARDEE in the Carey case and is *res adjudicata*.

(e) All of the rights of all stockholders, majority and minority, were cut off by the foreclosure decree, and there was nothing left for the majority to trade away or which it could acquire by the exercise of its powers as majority stockholder.

(f) All of the stockholders, majority and minority, were afforded equal rights and could have acquired an interest in the New Railroad Company by complying with the provisions of the reorganization agreement.

(g) The opportunity afforded to the Southern Pacific Co. to obtain the stock of the New Railroad Company, provided the floating debt creditors and stockholders did not avail themselves of the provisions of the reorganization agreement, was granted to it as a stranger or underwriter of the plan and not as a stockholder, and was based upon a valid consideration, viz., the guarantee of the bonds of the New Railroad Company.

When *all* of the facts are taken into consideration, it appears that counsel for the respondents fail to establish the necessary elements for applying the doctrine of a trust relation upon which they have so confidently relied.

It is to be borne in mind that the petitioner was *not* the *majority stockholder* of the Old Railway Company. It in fact did not own a single share of stock of that company. It owned a majority of the stock of the Morgan Company, which in turn owned 51 per cent. of the outstanding stock of the Old Railway Company. We have been unable to find any authority which holds that under such a state of facts as exists in this record the petitioner occupies under any circumstances a position of trust as to, or is trustee for, the minority stockholders of the Old Railway Company. The courts below cite, no authority to support the conclusion that such a relation exists and counsel for the respondents did not and could not cite any such authority.

A reading of the cases, in which the doctrine that the majority stockholder occupies toward the minority the position of trustee is applied, shows that such doctrine is based upon the theory that all stockholders have an equal interest in the corporate property based upon the actual ownership of stock of the corporation, and that the affairs of the corporation should be administered with equal fairness to all so interested. We submit there is no warrant or reason for extending the doctrine to a person or corporation who is not the owner of said stock, but simply controls the same by reason of a part ownership of the owner thereof.

IV.

The questions involved relate generally to reorganizations and the right of majority stockholders to protect rights which they have, independent of their stock ownership.

(a)

The plan and agreement of reorganization has been characterized by every court before which it has come for consideration as fair and the "best possible for the creditors, the company and the stockholders" and contemplated the payment of the floating debt. The plan was so characterized by Judge PARDEE in the Carey case, 45 Fed. Rep., 438, in which he stated: "*without payment of the floating indebtedness the stockholders could not hope to retain any interest in the company, and this floating indebtedness is practically all they were required to pay.*" (Italics ours.) Notwithstanding this construction of the plan, which was had when the plan itself was attacked as fraudulent and unfair to the stockholders by

this same Stockholders' Committee whom the Lawrence's Executors, the complainants herein, represent, the Circuit Court of Appeals in the case at bar affirmed a decree which restored to the minority stockholders their interest in the property without requiring them to pay or contribute in any way towards the payment of the debts due creditors.

Should a court in a suit by minority stockholders so construe a plan of reorganization, which in prior litigations has been characterized as perfectly fair and under which the rights of stockholders have been defined, so as to permit said stockholders to regain their interest in the corporation without payment being made to the creditors and without requiring the stockholders to comply with the conditions of the plan under which they are permitted to retain their interest? The question involved is: what is a fair plan and how should it be construed?

The gravity of such a question and its general importance is well illustrated by the statement made by Mr. Paul D. Cravath in his lecture on the Reorganization of Corporations delivered before the Association of the Bar of the City of New York, March 1 and 8, 1916:

"You will get some idea of the practical importance of this branch of professional activity when I tell you that during the past twenty-five years railroad corporations owning about one-half of the total mileage of the United States have been subjected to the process of reorganization or readjustment and that over eighty railroad corporations, owning about forty-two thousand miles of railroad or about sixteen per cent. of the total mileage of the country, with an aggregate capitalization of about two billions and a quarter dollars, are now in receivers' hands and awaiting reorganization. In addition, a surprisingly large proportion of the great industrial enterprises of the country, including several which are now enjoying sensational prosperity, have passed through some form of reorganization."

(b)

No case has been cited and counsel has after diligent search been unable to find any, in which the majority stockholder in a corporation has been held to be a trustee for the minority stockholders of a second corporation of which the first corporation in turn owned a majority of the stock, but in which the majority stockholder of the first corporation did not own a single share. Such a doctrine would make every holding company owning a majority of the stock of other companies a trustee for the minority in such other companies. Whether such a doctrine is sound should be determined by the highest court so that holding companies may have their rights and obligations properly defined.

(c)

To hold the majority stockholder as a trustee and also refuse to permit it to assert rights as a creditor of a second corporation of which it is also a majority stockholder is on the one hand to subject such majority stockholder to certain liabilities because of its ownership of stock and on the other hand to refuse to permit it to assert certain rights because of its ownership of stock. Such a question affects *all* corporations generally and affects all ownership of stock.

The contention of this petitioner, which was denied by the Circuit Court of Appeals, that, as the owner of a majority of the stock of the Morgan Company, it was entitled, if charged as a trustee, to be credited with the judgment obtained by that Company and that the minority should pay their *pro rata* share thereof was approved in the Circuit Court of Appeals in the dissenting opinion of Judge HUGH and is supported by the authority of *Cutting vs. Baltimore and Ohio Railroad Company*, 35 Misc., 617; affirmed 65 App. Div., 414; appeal dismissed 177 N. Y., 552.

(d)

A decree which accepts as correct and binding upon the parties an adjudication of another court, to the effect that a certain plan of reorganization is fair and valid, and which then proceeds to so construe such plan as to make it result in turning the property over to the former stockholders without payment of or provision for unsecured creditors, in effect holds that a plan of reorganization which provides a method whereby stockholders are preferred before the creditors, is fair and valid. Hence a decree based on such construction of a plan of reorganization presents as strong a case for relief through the writ of *certiorari* as would a decree expressly overruling the *Boyd* case and approving and giving effect to a plan or reorganization which, without providing for creditors and leaving them unpaid, permitted the old stockholders to acquire the property at foreclosure sale on paying the expenses of the sale and assuming the bond debt.

(e)

A decree which has the effect of denying to any majority stockholder or to any majority stockholder of a majority stockholder the right to act otherwise than as a trustee of all the stockholders at a foreclosure sale, even when such other stockholders have rejected an admittedly fair and reasonable plan for their equal participation in the purchase of the property, and the majority stockholder is acquiring the property to protect or further legitimate interests wholly independent of his stock ownership and incurs obligations as part of the price which the minority stockholders are unable, or at least are unwilling, to assume, is a decree which decides a question of grave and general importance, and decides such question wrongly.

V.

The prayer of petitioner should be granted.

New York, Nov. 23rd, 1917.

Respectfully submitted,

LEWIS H. FREEDMAN,

ARTHUR H. VAN BRUNT,

Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1917.

In the Matter of the Application of
the SOUTHERN PACIFIC COMPANY for
a writ of *certiorari* under Section
240 of the Judicial Code—
SOUTHERN PACIFIC COMPANY,
Petitioner-Defendant
(Defendant-Appellant),

AGAINST

HENRY L. BOGERT, TOWNSEND LAW-
RENCE, and ANITA LAWRENCE, as
Executors under the Last Will and
Testament of Walter B. Lawrence,
deceased, suing on behalf of them-
selves and other stockholders of
the Houston and Texas Central
Railway Company similarly situ-
ated who may come in and con-
tribute to the expenses of this
action, HENRY FITCH and RUSSELL
H. LANDALE, as Survivors of Com-
mittee of Stockholders, SARA
ROSENFELD and ROSETTA COHN, as
Executrices under the Last Will
and Testament of Charles Minz-

On Petition for Writ
of *Certiorari* Directed
to the United States
Circuit Court of Ap-
peals for the Second
Circuit.

ensheimer, and MICHAEL GERNSE-
HEIM,

Respondents
(Complainants-Appellees).

TO H. SNOWDEN MARSHALL, A. J. DITTENHOEFER, DAVID
GERBER AND DUDLEY F. PHELPS, COUNSEL FOR THE
ABOVE NAMED RESPONDENTS; AND TO THE ABOVE NAMED
RESPONDENTS.

PLEASE TAKE NOTICE that we shall, on or before the 24th
day of November, 1917, file in the office of the Clerk of the
Supreme Court of the United States the foregoing petition for
writ of *certiorari* and brief, together with the printed record
in the above entitled cause, and that we shall on the 17th day
of December, 1917, being a motion day of the October Term,
1917, of the said Supreme Court of the United States, upon
the opening of court, or as soon thereafter as counsel can be
heard at the court room of the Supreme Court of the United
States, move that the writ of *certiorari* be issued as in the said
petition prayed.

LEWIS H. FREEDMAN,
ARTHUR H. VAN BRUNT,
Counsel for Petitioners.

Received a copy of the foregoing notice and of the petition
for writ of *certiorari* and brief referred to therein, this 23rd
day of November, 1917.

Counsel for Respondents.



DEC 17 1917

JAMES D. WABER,
CLERK.IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1917.

In the Matter of the Application of the SOUTHERN PACIFIC COMPANY for a writ of *certiorari* under Section 240 of the Judicial Code—SOUTHERN PACIFIC COMPANY,

Petitioner-Defendant,
(*Defendant-Appellant*),

against

HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company similarly situated who may come in and contribute to the expenses of this action, HENRY FITCH and RUSSELL H. LANDALE, as Survivors of Committee of Stockholders, SARA ROSENFELD and ROSETTA COHN, as Executrices under the Last Will and Testament of Charles Minzensheimer, and MICHAEL GERNSEIM,

Respondents,
(*Complainants-Appellees*)

On Petition for Writ
of *Certiorari* Directed
to the United
States Circuit Court
of Appeals for the
Second Circuit.

Respondents' Brief in Opposition to Petition for
Writ of *Certiorari*.

H. SNOWDEN MARSHALL,
A. J. DITTENHOEFER,
DAVID GERBER,
DUDLEY F. PHELPS,

Counsel for Respondents.



IN THE
Supreme Court of the United States,

OCTOBER TERM, A. D. 1917.

In the Matter of the Application of the
Southern Pacific Company for a writ of
certiorari under Section 240 of the Ju-
dicial Code—SOUTHERN PACIFIC COM-
PANY,

Petitioner-Defendant,
(Defendant-Appellant),

AGAINST

HENRY L. BOGERT, TOWNSEND LAWRENCE
and ANITA LAWRENCE, as Executors
under the Last Will and Testament of
Walter B. Lawrence, deceased, suing on
behalf of themselves and other stock-
holders of the Houston & Texas Central
Railway Company similarly situated
who may come in and contribute to the
expenses of this action, HENRY FITCH
and RUSSELL H. LANDALE, as Survivors
of Committee of Stockholders, SARA
ROSENFELD and ROSETTA COHN, as Execu-
trices under the Last Will and Testa-
ment of Charles Minzensheimer, and
MICHAEL GERNSHEIM,

Respondents,
(Complainants-Appellees.)

On Petition
for Writ of
Certiorari to
the United
States Circuit
Court of Ap-
peals for the
Second Cir-
cuit.

**RESPONDENTS BRIEF IN OPPOSI-
TION TO PETITION FOR WRIT OF
CERTIORARI.**

This suit was commenced in the New York Su-
preme Court, and removed by petitioner to the

District Court, for the Eastern District of New York, on the ground of diversity of citizenship.

Statement.

Because of some omissions and unintentional inaccuracies in petitioner's statements of facts, it is necessary for respondents to briefly supplement the facts stated in the petition.

This is a suit on behalf of minority stockholders of the Houston & Texas Central Railway Company (hereafter called the Railway Company) against the petitioner, the majority stockholder, to compel it to give them their share of the consideration received by said majority stockholder in return for its surrender and withdrawal of the Railway's rights and defenses in foreclosure suits, in fulfillment of the terms of a reorganization agreement, dictated by it, and which made possible a foreclosure and sale of the property of the Railway Company, and its purchase by the petitioner.

The Railway Company was in litigation with its bondholders. It was successfully defending all efforts to foreclose. The Southern Pacific Company compromised the litigations, and, as part of the compromise, took all of the stock of a reorganized company, owning the same property, on better terms than were offered to these minority shareholders of the Railway Company. The simple point of the decision below is that it decrees that this compromise of corporate litigation was made for the real benefit of all shareholders of the Railway Company—not for the sole benefit of the majority shareholder.

No novel question is involved, nor is the matter of any general importance. The suit merely in-

volves what was only too common an occurrence twenty or thirty years ago, i. e., the conduct of a majority stockholder of a corporation using its power, for its own *exclusive* benefit, to bring about a foreclosure and reorganization of the corporation, and acquire the corporate property for its *sole* benefit.

Because of the Railroad and Corporation Laws, both federal and state, which have been passed in recent years, and the creation of Railroad Commissions, the methods pursued and acts accomplished by the petitioner cannot now be repeated, so that the questions involved can have but slight application at the present day to reorganizations.

The foreclosure and sale of the Railway Company took place in Texas in 1888, and for some years prior thereto the petitioner, through its subsidiary, the Morgan Company, which owned a majority of the stock of the Railway Company, by its choice of directors and officers of the Railway Company, absolutely controlled its affairs and management (fol. 791).

None of the mortgages involved in the said foreclosure suits contained any provision allowing the foreclosure for non-payment of interest, taxes or any other default, excepting for *non-payment of principal when due*, and the principal of these mortgages was not due for many years after the foreclosure (Macardell record, Exhibit E, pp. 291-681). These mortgages were also secured by public land grants of over 4,500,000 acres from the State of Texas, and contained the provision that the railroad could not be foreclosed until the lands themselves had *first* been sold to satisfy default in the non-payment of principal after maturity (fol. 797).

The suits to foreclose the mortgages were at a standstill, as the Railway's answers that the foreclosure could not take place, excepting for default in the payment of principal, were conclusive. (Chicago D. & V. R. R. Co. *v.* Fosdick, 106 U. S. 47.) Thereupon a compromise was effected between the bondholders and the petitioner, Southern Pacific Company, which was in control of the Railway Company. This compromise was reduced to a reorganization agreement executed in December, 1887 (fol. 80).

The Southern Pacific Company was one of the parties to this reorganization agreement, which provided that *all the existing mortgages were to be foreclosed, and the principal declared due* (fols. 84, 125), and a new company organized, which should acquire all the property of the Railway Company; and that the Southern Pacific Company could take all the stock of the new railroad company on payment of a price per share which was about one-third of the price the minority stockholders were to be charged per share for stock in the new company. The respondents had no knowledge of the reorganization agreement or its terms until after the entry of the foreclosure decree (fol. 819).

This suit is entirely free from equities of innocent third parties. The petitioner received the entire one hundred thousand shares of the new Railroad Company's stock, in accordance with the reorganization agreement, and admitted in its answer that it still owns and holds all of this stock, excepting directors' qualifying shares (fol. 248).

Although the respondents have been in continuous litigation with petitioner since the fore-

closure decree, this is the first suit which has passed upon the merits of the case. The principal reason for this was that over four and a half million acres of land were owned by the old Railway Company, and the respondents in the prior litigations have always attempted to recover their interest in this, as well as the stock held by the petitioner.

The courts held that the old Railway Company which went out of business after the foreclosure sale in 1888, was a necessary party to a recovery of these lands, as a distribution would have to go through the old Company, and the respondents were unable to get jurisdiction over it so their bills were dismissed.

The decree herein is most fair and liberal to the petitioner. It directs petitioner to deliver to respondents their shares of stock only upon being paid in full the pro rata amount, expended by petitioner for this stock under the reorganization agreement (fol. 1319), with legal interest from the date of payment by petitioner.

After the accounting before the master, the balancing of the amount expended by petitioner against dividends received by it, gave a balance of about \$25 a share, which respondents are directed to pay for stock which petitioner claims is worth little more than \$26 a share (fol. 1479).

I.

A Writ of Certiorari will only be issued where the questions involved are of great general importance, or to preserve the uniformity of decisions in the different circuits.

Furness, Withy Co. v. Yang Tsze Association, 242 U. S. 430.

Lau Ow Bew v. United States, 141 U. S., 47.

Re Woods, 143 U. S. 202.

United States v. Dickinson, 213 U. S. 192.

Forsyth v. Hammond, 166 U. S. 506.

United States v. Riner, 220 U. S. 547.

No novel question is here involved, but the familiar one of a majority stockholder using its control for its selfish interest, to the injury of the minority.

There is no conflict with other decisions. On the contrary, the decree follows a line of authorities Federal and State, which has been unbroken for generations.

II.

Creditors are in no way affected by this decree.

Petitioner's second point has no bearing on this application, as the question argued is in no way involved in this suit. The respondents had nothing to do with the reorganization agreement or foreclosure, and knew nothing about it until

after the sale took place (fol. 819). Without conceding that the creditors have been injured by the reorganization, we claim that even if the Southern Pacific Company succeeded in obtaining control of the reorganized road, to the prejudice of creditors, as well as the exclusion of minority stockholders, this cannot bar the minority stockholders from their claim against the petitioner for their share of the stock which it now holds.

Petitioner cannot shield itself behind its alleged wrongs to creditors to which respondents were not parties.

This decree in no way affects the rights, if any, that creditors might have if they were defrauded by the reorganization. They are not parties to this suit and are in no way affected by the decree, and can be no worse off with the stock equitably distributed among the stockholders, than if it remains in the possession of the majority stockholder.

The petitioner says at page 29: "When the decree has been fully complied with, the result of the reorganization of the old railway company is that the majority and minority stockholders are restored to their ownership of the property, but no creditor has been paid."

On the other hand, if the decree is not complied with, the result of the reorganization is that the majority stockholder alone remains in exclusive ownership of the property, *and no creditor has been paid*, so that the effect of this decree is absolutely immaterial to the creditors, and merely affects the stock ownership of the reorganized road. The trial Judge in dealing with this point said that the Respondents would take this stock

“subject to any claims which are still valid and enforceable against the stockholders, either through the Railway Company itself, or against the stockholders directly (fol. 850).

III.

There is no force in petitioner's contention that, because it was not a stockholder of record of the old Railway Company, but exercised its control of it through one of its subsidiary companies, it can escape the consequences of its acts.

It is immaterial whether the Southern Pacific Company was actually a stockholder of record of the old company, or held the stock in a subsidiary company or through its agents or dummies.

The trial Judge said “Eight of the nine directors of the Railway Company for four years preceeding 1888 were either officers and directors of the Southern Pacific Co., or its subsidiary companies.” (fol. 791).

Stock control is often lodged in brokers and bankers and holding companies or other dummies, who merely act as agents, and as the Circuit Court of Appeals says, in its opinion (fol. 1470): “It could not do with impunity indirectly what it had no right to do directly.”

This is no novel or important question that should be passed upon by this court, but is a

fundamental principle which has been passed upon many times, and is covered by the well-known maxim "*Qui facit per alium, facit per se.*"

The undisputed facts are that the Southern Pacific Company, through its agents or dummies, controlled the Railway Company and contracted for it, in the reorganization agreement, that it should withdraw its defenses and permit foreclosure. How could the Southern Pacific Company have made this contract but for its absolute control of the Railway Company? The petitioner cannot escape the result of its acts by sheltering itself behind one of its subsidiary companies.

The Circuit Court of Appeals said:

"We think there is nothing in the objection that the Southern Pacific Company cannot be held liable because it was not a stockholder of the railway company. This is literally true, but the record makes it perfectly plain that through its control of the Morgan Company, which held a majority of the stock of the railway company, the Southern Pacific Company did cause the railway company to waive defenses originally pleaded in the foreclosure suit and to consent to a decree of foreclosure. It could not do with impunity indirectly what it had no right to do directly." (Fol. 1470).

Petitioner's claim that no authority can be found for the doctrine that a majority stockholder can be held responsible for the acts of a corporation that it controls through a subsidiary company, is true only to the extent, that in suits heretofore involving efforts to impress trusts on illicit profits of majority shareholders, the defendants have actually owned the certificates

of stock evidencing their control of the corporation in question.

We call the court's attention to the recent United Shoe Machinery case (234 Fed. 127), in which the court held that, as the Maine Company was merely a subsidiary of the New Jersey company which, in turn, was controlled by the United Shoe Machinery corporation, the acts of the Maine Company were the acts of the New Jersey Company, for which the United Shoe Machinery Corporation could be held liable. In other words, that case goes one step further than at bar. There, Corporation A controlled Corporation B which, in turn, controlled Corporation C, and it was held, on evidence of the exercise of this control, that Corporation A should be held liable for the acts of Corporation C; whereas, in the case at bar, we only have two corporations, and Corporation A is merely held responsible for the acts which it did through Corporation B, upon undisputed evidence that it not only controlled Corporation B, *but directly exercised its control, to bring about the wrong complained of.*

There are many cases some of them decided in this Court to the same effect, cited in the United Shoe Machinery case, 234 Fed. at pages 140-143, inclusive.

Another recent case in the Circuit Court of Appeals, Eighth Circuit, is Chicago Mill & Lumber Co. v. Boatmen's Bank, 234 Fed. 41, in which the court held that where a corporation acquires and exercises control over another, it is responsible for its acts.

In Westinghouse Electric Co. v. Allis Chalmers Co., 176 Fed. 362, the Circuit Court of Appeals,

in their unanimous decision, went so far as to hold that where one corporation controls another, it is responsible for the acts of such other company, and may be held directly liable for its infringement of a patent.

A subsidiary of the Allis Chalmers Company infringed a Westinghouse patent and the court said at page 367:

"The substance of the matter is that the Allis Chalmers Company is the unquestioned master whose orders are obeyed, and we think that under such circumstances a court of equity may well look behind the corporate screen and determine where the real and responsible power lies. * * * In our opinion, therefore, it is liable for the infringing act complained of *as being an act done through a controlled agency*" (italics ours).

This is such a well-recognized principle that it seems unnecessary to burden this court with any more authorities than those contained in the Shoe Machinery case, 234 Fed. at pages 140-143.

IV.

There is no force to petitioner's contention that this decree gives a new and different interpretation to the reorganization agreement from that contained in the Texas suit.

(a) The question of the meaning of the reorganization agreement was never raised in the

trial court or the Circuit Court of Appeals. It is plain, and its meaning was never disputed or questioned in this suit.

It is urged by our adversaries that in the pending case, a different construction is given to the reorganization agreement from that given by Judge Pardee in the Texas litigations. Such is not the case. The suit before Judge Pardee involved an effort to upset the whole foreclosure decree, and restore the property to its status quo ante, irrespective of the rights of intervening holders of new securities.

Judge Pardee did not have before him the question whether the minority shareholders, while ratifying the foreclosure, could assert their rights as between themselves and the Southern Pacific Company. Everything he said may be treated as true and still leave undecided the question whether the consideration for the settlement made between the old Railway Company and its bonded creditors should not be divided among all of the stockholders of the old Railway Company.

(b) There is no force to petitioner's contention that the decree should allow it to set off the Morgan Company debt.

This claim of the Southern Pacific Company is a mere afterthought.

There is no exception in the record, and no assignment of error that seems to raise the point now urged. Not only was no offer of evidence made on this subject, but the exceptions to the master's report merely state the fact that the master refused to charge the respondents "with

judgments entered against the Houston & Texas Central Railway Company, by the Lackawanna Iron & Coal Company, by the Morgan's Louisiana & Texas Railroad and Steamship Company and by the Southern Development Company" (fols. 1304-5). No error, was, nor could have been assigned for refusal to find the Southern Pacific Company was entitled to any sum, because of its stock ownership in its subsidiary company, as no evidence to this effect was offered.

Neither is there an assignment of error covering petitioner's present contention. There is merely an assignment of error that the court did not permit the petitioner to receive credit for the amounts of the judgments in favor of the floating debt creditors, Lackawanna Steel Company, the Morgan Company and the Southern Development Company (36th assignment, fol. 1397), but no claim is made in regard to the Morgan Co. debt because of its stock ownership.

This court recently held in *Tyrrell v. District of Columbia*, 243 U. S., 1, that it would not review facts on certiorari that were not properly presented in the court below and preserved by exceptions.

Although no evidence was offered on this point, as it was not raised until after the evidence was closed, the records of the prior litigations, in evidence in this case, show the following facts:

This Morgan Company debt was secured by \$883,000. of bonds of the old Railway Company (fol. 4829, MacArdell record, Exhibit E), which were exchanged for bonds of the new company upon the reorganization (fols. 150-151). The amount of this debt had been reduced to \$1,057,498 (see p. 133, Circuit Court of Appeals record, which shows a debit of \$1,616,214, and a credit of \$558,-

716., leaving a debit balance of \$1,057,498). Deducting from this \$883,000. of bonds held as security, leaves a balance of \$174,498.

In addition to this, the Southern Pacific Company's interest in the Morgan claim would be only one-half of this amount, or about \$87,000, as it only owned a bare majority of that stock. It is, therefore, very apparent that the Morgan Company did very well in collecting over 88% of the claim against a Railway in receiver's hands. The Circuit Court of Appeals said on this point:

"The defendant insists that it should receive credit for so much of the railway company's floating indebtedness as it gave up to carry the reorganization through, and that the minority stockholders should be assessed for their proportionate share of it. There is great force in this contention as stated. *The trouble is that it was never raised in the case by pleading or otherwise until an exception was taken to the report of the special master. There is nothing in the record to show what, if anything, the Southern Pacific Company did give up.* So far as appears, it was not a stockholder of the Lackawanna Company or of the Development Company, and could be interested in the claim of the Morgan Line only to the extent that it would be entitled as a stockholder to receive after payment of that company's indebtedness. Furthermore, the Morgan Line was secured by the bonds of the railway company as collateral of the face value of \$880,000. Under these circumstances it is quite impossible to say what, if anything, the Southern Pacific Company gave up in connection with the railway company's floating indebtedness" (italics ours) (fol. 1471).

(c) Petitioner's contention that the complainants in the foreclosure action were entitled to the decree of foreclosure in spite of the defenses in the answer is against the law and evidence.

This was unanimously decided to the contrary by the trial court and the Circuit Court of Appeals upon the undisputed evidence that no foreclosure decree could have been entered without the withdrawal of the Railway's defenses, as provided for in the reorganization agreement *which was filed in the foreclosure suit*, and the defenses withdrawn before the decree was entered (fols. 806, 807 and 840).

The Courts below unanimously found the facts against petitioner's present contention. The trial Judge said at folio 818:

"The reorganization agreement was prepared under the direction and apparently after much negotiations of the attorneys for the Southern Pacific Company's directors and officers with the representatives of the bondholders. The rights of the stockholders of The Southern Development Co., of the Morgan's Steamship Co., and of the Houston and Texas Central Railway Co., were all supposedly taken care of by those who were interested in securing a reorganization, from the standpoint of the Southern Pacific Co. or the bondholders.

"It would appear that some representatives of the minority stockholders had knowledge of the matter before the sale under foreclosure, but during the negotiations as to the reorganization agreement and even after the arrival of the New York representatives of the Southern Pacific Co. and of the various

bondholders, in Texas, it is evident from the record that no notice was given to or had by the minority stockholders, of the proposed plan of reorganization, until the litigation had been disposed of by what was in effect a consent decree or submission of facts for the entry of a decree, if approved by the court; and but one day intervened, after the various foreclosure suits were gotten in condition for hearing, and before a decree of foreclosure and sale, in the consolidated action, was entered upon the consent of the majority stockholders of the Houston and Texas Central Railway Co., and of all the various parties representing the corporations and the bondholders as a class."

The trial Judge, in his first opinion upon the trial of the separate defense, summarizes the facts in regard to this feature of the case as follows (fols. 806-809):

"The minority stockholders of the Texas & Houston Railway Company are shown nowhere in the records to have had notice of or been parties to the negotiations until after foreclosure decree had been had. *The reorganization agreement provided that all existing mortgages were to be foreclosed and a new company organized to take over all the property and franchises of the railway company.*

The defenses interposed were not to be relied upon, and the Central Trust Company was to act as purchasing trustee, with power in its option to declare the principal of the bonds, deposited under the reorganization agreement, to be due, and to assist in the prosecution of or to become a party to any suits then pending or which might thereafter be brought.

All of the mortgages referred to (except the Income and Indemnity mortgage) had still

some years to run, and none of these (except the Income and Indemnity mortgage) contained a provision for the foreclosure and sale of the road, except for non-payment of the principal of the mortgage.

The Income and Indemnity bonds had previously been exchanged for general mortgage bonds and were held by the Farmers' Loan & Trust Company as collateral therefor. The suit on these Income and Indemnity bonds was begun upon April 30, 1888, as a part of the reorganization plan. Upon May 1st, the railway company filed an answer admitting the allegations of this bill, and on May 2d the railway company answered the cross-bills of the Farmers' Loan & Trust Company in the other actions. On May 4th, decree of foreclosure and sale was entered in the consolidated actions.

The consent of the railway company to declare the principal due of the bonds which might be deposited was given by the Southern Pacific Company, controlling a majority of the stock of the railway company, and consent was likewise given, in the reorganization agreement, to the Central Trust Company to form the new corporation to which was to be conveyed all of the property purchased by the Central Trust Company as trustee." (Italics ours.)

In his opinion on the main issue the trial Judge said:

"But it is evident even if the Court might have, under the laws of Texas, upon the proper findings of fact, ordered a sale of the property, it did not do so, and that *the foreclosure was ultimately had upon the agreement of the parties.* * * *" (fol. 840).

As a matter of law, the foreclosure and sale for the principal of the mortgages could not have

taken place if the Railway had not withdrawn its defenses.

Chicago D. & V. R. R. Co. *vs.* Fosdick, 106 U. S. 47.

(d) Petitioner is incorrect in saying that there was testimony before the master "tending to show" the release of this stock from the French loan, would precipitate the maturity of the loan.

This question of fact was not only decided to the contrary in respondents' favor by the master and by the trial judge in his interlocutory decree, but was again passed upon by the trial judge on motion, after the decree, and was unanimously affirmed by the Circuit Court of Appeals in its decision and also upon the motion for re-argument in the Circuit Court of Appeals.

The petitioner placed this stock in the French loan at its peril, as it had at that time full knowledge of respondents' claim. The French loan was made by petitioner in 1911, at the time the respondents' prior suit against the petitioner brought through Mr. Lawrence was pending in the United States Supreme Court.

Counsel for the Southern Pacific Company having in view the possibility, nay probability, of being required to withdraw all or a portion of the stock of the Houston & Texas Central Railway Company, was careful to insert a provision in the French loan mortgage, giving the Southern Pacific Company the right to withdraw the stock and substitute other collateral for it, and fixed the value, for the purposes of the loan, at \$50. a share

(fol. 1290), with the carefully drawn provision that "No reappraisal of the securities remaining on deposit shall be made or required in connection with the withdrawal of the securities, not exceeding five million dollars in the aggregate of appraised value, requested prior to September 1, 1911." As the agreed value of the stock was \$50. a share, the securities of the Railroad Company deposited under this mortgage was \$4,999,150. (p. 22, French loan agreement, Exhibit 14; also fol. 1290).

In addition to this, the petitioner had no right to pledge respondents' stock. The twenty-ninth paragraph of the Lawrence complaint (Supreme Court title was Bogert executor against Southern Pacific Company), after alleging the acquisition of all the stock of the new Railroad Company by the petitioner, declared that "When the said Southern Pacific Company received and accepted the said ten million dollars of stock, it received the same charged and impressed with a trust for the benefit of the plaintiff and all other minority stockholders, and the said Southern Pacific Company now holds the said stock as such trustee, and not in its own right" (fol. 56, Lawrence record, Exhibit F).

The first paragraph of the prayer for relief is as follows: "That it be adjudged and decreed that the defendant, Southern Pacific Company acquired and holds the said ten million dollars par value of capital stock of the Houston & Texas Central Railroad Company, and all profits which it has received or may receive from holding said stock as trustee for the plaintiff and other minority stockholders of the Houston & Texas Central Railway Company who may come in and con-

tribute to the expenses of the action, as the respective rights of said defendant, Southern Pacific Company, and said minority stockholders may be adjudged by the court" (fol. 68, Lawrence record, Exhibit F).

The petitioner, therefore, had full notice that respondents claimed their share of the stock.

This present contention of the petitioner is a mere afterthought. In its answer it did not even mention the French loan agreement, but, on the contrary, alleged in paragraph 27th (fol. 248), that the petitioner "now holds and owns and claims to own and hold all the railroad stock, excepting a few qualifying shares held by directors" and nothing was said upon the trial about the French loan.

It was only after the submission of the proposed interlocutory decree, that, for the first time, petitioner called the court's attention to the fact that it had pledged the stock *pendente lite*.

V.

Respondents have not been guilty of laches.

There is a faint suggestion in the brief of our adversaries that this court should review this case because of the supposed validity of the defense of laches.

Allusion is made to many previous litigations, and it is pointed out that the so-called French loan would not have been made, nor would the

Southern Pacific Company have incorporated this Railway in its system, if prior litigations had fared better in the courts.

This question does not call for an extensive discussion because the defenses of *res adjudicata*, of election of remedies, etc., are abandoned by our adversaries. So far as laches is concerned, a very simple question of fact is involved, which has been passed on by this court in numerous cases. The defendant's contention along this line was dealt with by the trial court in the following language, (fol. 625):

"It is urged by the defendant that its records have been lost, witnesses disappeared, that the lapse of time has rendered it impossible to fairly try the case, and that this has occurred with the knowledge of plaintiffs' predecessor (testator) for such a period that he should not now be allowed to take advantage of his previous neglect. The former records of the case have indicated that no serious difficulties are presented upon this score, and that, strange as it may seem, the case can now be tried with a record of the necessary testimony in substantially as complete a way as if undertaken many years ago."

The Court on appeal said (fol. 1476):

"We do not think that the circumstances of this case justify defeating the complainant because of laches. One familiar ground is acquiescence, but the minority stockholders have not slept on their rights. They have been striving for many years to recover. No acquiescence, but exactly to the contrary, a continuous and vigorous protest, appears. So far as the defense of laches depends, not on the mere passage of time,

but upon another familiar ground, viz. a change in the situation prejudicial to the defendant, there is no evidence whatever to sustain it. The exact nature of the case has been known to the defendant from the beginning, and there is no substantial dispute of fact. No equities have intervened. It would be most inequitable to forfeit the complainant's rights notwithstanding the very long and unusual delay in prosecuting them."

VI.

The decree is more than fair and liberal to the petitioner.

The respondents are required, as a condition of receiving their pro rata share of the stock of the reorganized company, to pay petitioner their pro rata share of *all moneys* expended by the petitioner for the acquisition of the stock (less the dividends received thereon) *with interest* (see decree, record, p. 284, fol. 852). The accuracy of the figures is not disputed.

The answer asserts that the petitioner paid pursuant to the reorganization agreement, in order to acquire the ten million dollars par value of stock of the new company, approximately \$26 a share (see answer, par. LXI, p. 120). Not an additional dollar was paid by the petitioner for any other purpose (answer, par. XXVIII, p. 83; see opinion of trial court, p. 271, fol. 811; see opinion of Court of Appeals, fol. 1464).

The petitioner is placed in precisely the same position as though it did what, in equity, it should

have done when it acquired the new stock, i. e., deliver to the respondents their pro rata share, and receive a proportionate share of the moneys laid out by petitioner, in acquiring the stock. The respondents are required to pay *interest at the rate of six per cent per annum from the time petitioner expended the moneys to date of entry of final decree.*

It may be questioned whether the innocent respondents should be required to pay interest on the \$26. a share, because it was not their fault that petitioner refused to deliver the stock to which they were entitled. The trial court, however, by its decree, directed not only the reimbursement to petitioner of every dollar which it expended, but also allowed the legal rate of interest upon the money from the date of expenditure to the entry of decree.

This stock was claimed by the petitioner, before the special master appointed by the interlocutory decree, to be worth between \$25 and \$30 a share (fol. 1043).

The learned appellate court below said:

“As the defendant owns the whole of the reorganized company capital and contends that it is worth but little more than the assessment of \$26 a share, a long inquiry would have to be gone into to ascertain its value. Therefore we think the court below was right in requiring that stock to be delivered in specie”. (Fol. 1479).

VII.

The application for a Writ of Certiorari should be denied.

Respectfully submitted,

H. SNOWDEN MARSHALL,
A. J. DITTENHOEFER,
DAVID GERBER,
DUDLEY F. PHELPS.

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Supreme Court of the United States.

OCTOBER TERM, 1918.

SOUTHERN PACIFIC COM-
PANY,
Petitioner,

v.

HENRY L. BOGERT *et al.*, as
Executors, &c., *et al.*,
Respondents.

No. 305.

ADDITIONAL BRIEF FOR SOUTHERN
PACIFIC COMPANY.

The respondents, who were plaintiffs below, will hereafter be referred to as the "plaintiffs," and the petitioner, Southern Pacific Company, as the "defendant."

I.

The basis of the plaintiffs' claim.

The plaintiffs base their claim on the theory that the defendant surrendered "rights and defenses" of the Houston & Texas Central Railway Company and thus "made possible the foreclosure and sale of" its property. Thirty-two pages of the plaintiffs' brief in the Circuit Court of Ap-

peals were devoted to the support of this theorem. But what are the facts? The Railway Company had outstanding at the time of the entry of the foreclosure decree a funded debt of about \$18,000,000 (exclusive of bonds that were pledged as security for other bonds), on which there was interest due and unpaid amounting to about \$5,000,000 additional (see foreclosure decree, MacArdell Record, pp. 835 *et seq.*). There was also a floating debt amounting to more than \$3,000,000—a total indebtedness of \$26,000,000, which was constantly increasing. The operations of the Railway Company for years prior to the foreclosure had resulted in a deficit (*id.*, 262). From 1877 to the time of the foreclosure, the Railway Company had paid no dividend (Carey Rec., 1045). Since 1881 its earning power had been adversely affected by the construction of the Gulf, Colorado and Santa Fe, which paralleled the Houston & Texas Central Railway for nearly its entire length (*Gernsheim v. Olcott Rec.*, 219). The Income and Indemnity bonds, \$1,500,000 of which were outstanding, matured May 1, 1887, and were therefore past due. The mortgage securing these bonds covered the entire property of the Railway Company and was a lien subsequent to that of all the other six mortgages of the Railway Company, save the General Mortgage. The Income and Indemnity Mortgage spe-

cifically provided for a sale of the mortgaged properties in case of default (MacArdell Rec., 603-604). It is true that most of the Income and Indemnity bonds were pledged under the General Mortgage, but this did not prevent the enforcement of the pledged bonds. It was the duty of the trustee of the General Mortgage to collect the past due principal and interest of securities held by it as collateral. The General Mortgage expressly provided that prior lien bonds which had been exchanged for General Mortgage bonds should not be cancelled until the entire issue was exchanged, but should be held "as an additional security for the" General Mortgage bonds (*id.*, 816). Moreover, nearly \$1,000,000 of interest was in default on the General Mortgage bonds (*id.*, 877).

The plaintiffs' brief in the Circuit Court of Appeals would give the impression that the Income and Indemnity bonds could not be enforced because pledged. This was not the fact. The plaintiffs are also in error in asserting that the principal of the Income and Indemnity bonds was due at the time the General Mortgage was issued (C. C. A. Brief, p. 47*b*). The former mortgage became due May 1, 1887 (MacArdell Rec., 866), while suit to foreclose the latter was begun in the year 1886 (*id.*, 411).

Apart from the question of the foreclosure of the prior mortgages for principal (see defend-

ant's main brief, Third Point, p. 46), the sale of the entire property of the Railway Company could have been accomplished at the instance of the holders of the (1) Income and Indemnity bonds, (2) floating debt, or (3) past due coupons of the various bond issues. The defendant could not have prevented the sale. It plainly endeavored to do so.

Mr. Tweed, for years General Counsel and subsequently Chairman of the Board of Directors of the defendant, testified in the *MacArdell Case* that, with the hope of carrying along the old Railway Company and saving the property from foreclosure, the Southern Development Company and the Morgan's Louisiana & Texas Railroad & Steamship Company (two of the defendant's subsidiary corporations) made advances to the Railway Company (MacArdell Rec., 238) aggregating about \$2,800,000; that this amount constituted the principal portion of the floating debt (*id.*, 240); that the necessary advances for interest payments had been made by the Morgan's Company up to the time when the latter Company's stock was purchased by the Southern Development Company; and that "after that we [meaning the Southern Development Company] made advances to pay the interest on the Houston & Texas Central Railway Company's bonds, * * * until we found the burden too great" (*id.*, 242).

At the time of the entry of the foreclosure decree, the Railway Company owned from 3,500,000 to 4,500,000 acres of land (Carey Rec., 751). From the organization of the Company to December 31, 1891, the expenses of the land grant exceeded the revenue derived from the lands by more than \$100,000 (*id.*, 1142). The average price obtained for the lands during the receivership was \$2.75 to \$3 per acre, and only small quantities could be sold (*id.*, 981). A market had been found for only the best of the lands (*id.*, 1041), although they had been widely advertised for sale throughout the United States (*id.*, 1039, 1044). The title was in dispute (*Gernsheim v. Olcott* Rec., 220). A considerable portion of the land would not have brought 25 cents an acre. Much of the land was undesirable grazing land in a dry locality, for which there was no sale (Carey Rec., 1040). At forced sale, the entire land grant would have brought an average price of fifty cents an acre (*id.*, 1039), possibly seventy-five cents (*id.*, 1045). Each section of the Railway Company's land was flanked by land owned by the State of Texas; and the latter offered its agricultural lands at \$2.00 per acre on forty years' time—one-fortieth of the purchase price payable in cash and the balance in equal annual payments (*id.*, 1039). The General Mortgage bondholders' protective committee were satisfied, after examination, that a forced sale of

the lands could be made only at "a ruinous sacrifice" (*Gernsheim v. Olcott Rec.*, 220).

From a report of the defendant to its stockholders for the year 1913, showing the ultimate result of the sales of these lands, the plaintiffs seek to make it appear that a quarter of a century earlier the foreclosure could have been prevented by an auction sale of the same property. But Texas of to-day is a different proposition from Texas of 1888, and the advantageous sale of lands over a twenty-five year period, on long credit, is a different thing from a forced sale for cash.

II.

The reorganization was fair and the plaintiffs are not entitled to impress a trust upon any portion of the new company's stock.

The ownership of a majority of the stock of a corporation does not constitute such owner a trustee for the minority stockholders. The majority stockholder has his own interest in the corporation, and this interest he has a right to protect. A trust relationship between the majority and minority arises only where the majority stockholder has used his powers as such oppressively and so as to injure the latter.¹

¹Cook on Corporations (7th Ed.), § 662 & ca. ci.

This principle was recognized in the *Boyd Case*, 228 U. S. 482, 503, and in the cases there cited. The Court said that it is now well settled that reorganizations leaving an interest in stockholders are not necessarily illegal if made by means of a judicial sale, and may "bind creditors who do not accept fair terms offered;" that "a combination is necessary to secure a bidder and prevent a sacrifice;" and that "cooperation being essential, there is no reason why the stockholders should not unite with the bondholders to buy in the property." By a parity of reasoning minority stockholders "who do not accept fair terms offered" are equally bound; and in this case the terms offered the minority stockholders were fair.

The mortgage debt was by the reorganization scaled down and the fixed charges much reduced. By paying the proportion of the reorganization expenses and of the floating debt that their stock bore to the total stock, the minority stockholders were entitled to acquire a *pro rata* share of the new stock. Although the new stock represented the entire property subject only to the mortgage debt thus reduced, the minority stockholders did not accept this offer. What more could the minority stockholders have asked? Did they expect to be preferred to the floating debt? A reorganization so framed would have been condemned by this Court under the doctrine announced in the

*Monon*² and *Boyd*³ Cases. As was said by the Court in one of the earlier attacks upon this reorganization (*Carey v. H. & T. C. Ry. Co.*, 45 Fed. 438, 442):

"On the showing made the charges in the bill of collusion and fraud to the prejudice of the company and stockholders are groundless; in fact the contrary appears, to-wit: That in the proceedings sought to be reviewed the interests of the defendant company and its stockholders were considered and protected to a degree beyond just legal demands, and, by the decree complained of and the reorganization agreement referred to in the bill, the stockholders are placed upon a better footing than would have resulted from the strict enforcement of the bondholders' mortgage rights."

Not only was the proposed plan of reorganization equitable, but the execution of the plan was fair. The amount to be paid under the terms of the reorganization agreement was not ascertained by the majority stockholder, but by the Central Trust Company, a disinterested and unbiased party, after thorough investigation (*Gernsheim v. Central Trust Company*, 40 N. Y. St. 967, 968, 971).

The defendant acquired the stock of the new company only after the plaintiffs had declined to

²*Louisville Trust Company v. Railway Company*, 174 U. S. 674.

³*Northern Pacific Railway Company v. Boyd*, 228 U. S. 482.

take any portion of it on the fair terms offered them. The defendant did not secure this interest in the new company through its indirect stock ownership in the old. The defendant was able in the reorganization to acquire the new stock by three means:

(1) By its control of the greater portion of the floating debt of the Railway Company;

(2) By its guaranty of the interest and a part of the principal of the new securities; and

(3) By its dominant position as the owner of a great transportation system with which the Houston & Texas Central Railway connected.⁴

If fair terms had not been offered them, the plaintiffs might with some plausibility urge that they are entitled as minority stockholders to share in any advantages that the defendant has been

⁴If the Railway Company's properties had been acquired by interests other than the defendant, it would have been disastrous for those interested in these properties. The Chairman of the Consolidated Bondholders' Protective Committee testified:

"Unless amicable relations existed between the two corporations, that the Houston & Texas could not exist" (Carey Rec., 734).

The President of The Farmers' Loan & Trust Company, the trustee of several of the Railway Company's mortgages, testified with reference to the Reorganization Agreement:

"If this arrangement had not been carried out, it is probable that the road would have been sold under foreclosure of the first mortgages, and all rights of every description of the junior bondholders and of the Railway Company itself and its stockholders have been finally extinguished" (Gernsheim v. Olcott Rec., 224).

enabled to secure through its position as indirect owner of the majority stock; but even had the plaintiffs been ignored and no terms whatever offered them, they could not properly claim to share in advantages, if any, that the defendant has gained through the three means above mentioned. Where a majority stockholder uses his position as such oppressively, the advantages gained are derived through the corporation and belong ratably to all of the stockholders; but where benefits are secured through outside means and are not derived through the corporation, the stockholders have no just cause of complaint.

As a matter of fact, there was no equity in the property for the stockholders, and the plaintiffs "were considered and protected to a degree beyond just legal demands" (*Carey v. H. & T. C. Ry. Co.*, 45 Fed. 438, 442).

The language of the majority opinion in the *Boyd Case* suggests that the rights of the minority stockholders are not to be made dependent, in close cases, upon an appraisal of the property of the old company in order to determine whether or not the value of such property exceeded the amount of the mortgage debt; but there is no statement in the opinion that the action of interested parties should not be considered in determining the question. It will be remembered, too, that the *Boyd Case* was decided by a majority of

one, the dissenting justices being of opinion that in order to succeed, the complainant must prove "fraud in the decree" (228 U. S. 482, 512).

That the action of interested parties may be considered in order to determine whether or not there was any equity in the mortgaged property is emphasized by the later case of *Kansas City Southern Railway Company v. Guardian Trust Company*, 240 U. S. 166, 176. There the question to be decided was the right of unsecured creditors to charge the new company with a debt due them by the old company; and in this respect the same principles are applicable to minority stockholders as to unsecured creditors. The Court said that in order to determine the justice of the claim of such creditors (Holmes, J.):

"It is essential to inquire whether the appellant [the new company] received any such property, that is whether it got by the foreclosure more than enough to satisfy the mortgage, which was a paramount lien."

The Court answered this inquiry by reviewing the action of the interested parties.

In the case at bar what does the action of interested parties show?

(1) The holders of the mortgage debt accepted in satisfaction thereof a reduced amount of securities in the new company, bearing a lesser rate

of interest. This is evidence that there was no equity in the property for the stockholders. True it is that, in making these concessions, the bondholders were influenced by the defendant's guaranty of a part of the new securities and by the traffic advantages and other improved conditions that would result from the incorporation of the mortgaged property into the defendant's great transcontinental railroad system; but if the mortgaged property had been equal in value to the bonded debt, the bondholders would neither have consented to a reduction of the debt nor have needed the defendant's guaranty.

(2) Moreover, the action of the unsecured creditors with respect to the reorganization can be explained only on one of two hypotheses: either they failed to take new stock, because the property was not deemed to be worth more than the mortgage debt; or the floating debt actually did participate in the new stock, since this debt was controlled by the defendant. Upon the latter hypothesis, the defendant in taking up the new stock acted in the character of a floating debt creditor, and not that of a majority stockholder as the plaintiffs allege; and if the defendant acted as a floating debt creditor in acquiring the stock of the new company, the plaintiffs, whose rights are subordinate to those of creditors, cannot con-

tend that it holds any portion of the new stock in trust for them.

(3) The further fact of the minority stockholders' failure to take advantage of the opportunity offered them to acquire a portion of the stock of the new company by paying a proportionate part of the floating debt and of the reorganization expenses, shows that they did not consider the equity in the property then worth that amount; and if the property was not worth the amount of the reduced mortgage debt plus the floating indebtedness, and the expenses of reorganization which brought about the reduction in indebtedness, then the plaintiffs had no equity in the property to protect, but their interest was wiped out by the foreclosure.

Although the receivership began in the year 1885, and the reorganization plan was widely advertised in the *New York Tribune*, *Times*, *Sun*, *Herald*, *World*, *Post*, *Mail and Express*, *Journal of Commerce* and other papers, the first of such advertisements appearing early in January, 1888, five months prior to the foreclosure decree (Carey Rec., 1013 *et seq.*), and although the agreement of reorganization was filed in the consolidated foreclosure suit prior to the entry of the foreclosure decree (Mac-Ardell Rec., 919), neither the plaintiffs nor

their predecessors in interest sought to intervene in the foreclosure suit. They did not begin their attacks until the end of the year 1889 (Carey Rec., 1). The next suit, *MacArdell v. Olcott*, was not begun until August, 1891, and was not tried until 1902 (MacArdell Rec., 3). The chief excuse for delay was the pendency of the Carey suit (R. 173), but the Carey suit, after two ill-advised appeals to this Court, was finally disposed of in March, 1896 (161 U. S. 115). One might almost have fancied that the MacArdell suit had been abandoned, but 1901 was an unusually prosperous year for the Railroad Company (MacArdell Rec., 264). When the report of its earnings was made public, the plaintiffs' interest revived and the *MacArdell Case* was moved for trial. This was fourteen years after the entry of the foreclosure decree.

The defendant, which had in effect underwritten the reorganization by guaranteeing all of the interest and a part of the principal of the new securities (R., 48) not only paid the expenses of the reorganization,⁸ but through its control of the greater portion of the unsecured debt eliminated this charge upon the property. The defendant, therefore, did all that the plan of reorganization required of the minority stock, and

⁸See Reorganization Agreement (R., 34). The plaintiffs admit that this agreement was carried out in accordance with its terms (R., 15).

more. It took care of the reorganization expenses and of the floating debt, and in addition made the guaranty above referred to. In other words, it acquired the new stock on more onerous, not on more favorable, terms than were offered the minority stockholders. True, so far as the record shows, the defendant has not been called upon to make this guaranty good; but at the time of its assumption the obligation was a heavy one. It was a prime requisite to the success of the reorganization. The reorganization could not have been consummated without it. The operation of the property had for years resulted in a large deficit (Mac-Ardell Rec., p. 262; *Carey v. H. & T. C. Ry. Co.*, 52 Fed. 671, 675), and the ultimate earning power of the property was in large measure due to its wise management under the defendant's control and to the advantages resulting from its incorporation into a great system of transcontinental railroads.

Frequently, in prior litigations the minority stockholders have charged the defendant with collusion and fraud in connection with the reorganization. Similar charges (subsequently withdrawn) were made against the Central Trust Company in connection with its ascertainment of the so-called assessment to be paid by the stockholders of the old company in order to enable

them to share in the stock of the new company,⁶ but in every case where such charges were made the Courts have held them baseless.

In all the thirty years of litigation that has grown out of this reorganization, none of the courts concerned have questioned the defendant's good faith. In the first suit, namely, that instituted by Gernsheim in September, 1889, nearly two years after the making of the reorganization agreement and a year after the foreclosure sale, the Court said (Patterson, J.):

"It sufficiently appears that the foreclosure suits were conducted and carried to decree solely in the interest of the encumbrancers, and without any design to aid in a scheme to injure stockholders of the railway corporation."

Gernsheim v. Olcott, 7 N. Y. Supp. 872, 877.

⁶In *Gernsheim v. Central Trust Company*, 40 N. Y. St. 967, 968, which was an attack on the action of the Central Trust Company in fixing the amount of this so-called assessment, the General Term of the New York Supreme Court affirmed the judgment of the lower court on the opinion below, a portion of which was as follows:

"There is not a symptom or trace of fraud on the part of that company [Central Trust Company] in fixing the amount to be paid by the stockholders, and it plainly appears that by its agents it gathered the data, examined the facts, made a thorough investigation, considered the report of the agents in executive committee and also at meetings of the board of directors, and after a careful and prolonged inquiry reached a conclusion and made a statement, giving in a formal account, and in clear and full detail, all the items entering into its final determination of the amount with which the stockholders were to be charged."

On appeal to the General Term of the New York Supreme Court from the foregoing decision, the Appellate Court said:

"The entire case made by the complainant, in support of the relief, was minutely and ably examined by the learned judge at special term, and every question presented was decided adversely to the plaintiffs, * * *. In his reasoning and conclusions as to these questions we fully concur."

Gernsheim v. Olcott, 31 N. Y. St. 321, 322.

In the case of *Carey v. H. & T. C. Ry. Co.*, 45 Fed. 438, 442, the Circuit Court said:

"On the showing made the charges in the bill of collusion and fraud to the prejudice of the company and stockholders are groundless; in fact the contrary appears, to-wit: That in the proceedings sought to be reviewed the interest of the defendant company and its stockholders were considered and protected to a degree beyond just legal demands, and, by the decree complained of and the reorganization agreement referred to in the bill, the stockholders are placed upon a better footing than would have resulted from the strict enforcement of the bondholders' mortgage rights * * *."

"Without payment of the floating indebtedness, the stockholders could not hope to retain any interest in the company, and this floating indebtedness is practically all that they are required to pay" (p. 443).

At the final hearing of the same case, the Court said (52 Fed. 671):

"The record and proofs do not show that the decree complained of was affected with collusion or fraud to the prejudice of the complainants. In the first place, the complainants, as stockholders, have not been injured by the decree and sale thereunder, but rather benefited. * * * The result of the sale and the reorganization thereunder is that, without increasing the amount, the interest upon the bonded debt has been largely reduced, long-time bonds substituted, and the amount of the floating indebtedness is not increased. Complainants contend that the decree complained of was a consent decree, obtained by collusion between the creditors of the Company and the Southern Pacific Company, by which the defendant railroad company was precluded from making proper defenses to the suits for foreclosure. This contention is not borne out by the proofs. The answers of the railway company were not withdrawn. Testimony in the suit was taken; in fact, the record teemed with evidence in the nature of admissions by all the parties, tending to show the justice of the creditors' demands, and the fact that the railroad company had no meritorious defenses * * *. It was of little interest to the stockholders of the Houston & Texas Central Railway Company (who, so far as the record shows, never proposed to pay anything) whether the principal of the first

main line and western division mortgages was declared due or not, when the interest thereon past due was in amount far beyond the ability of the company to meet, and for which a foreclosure was inevitable; and which, with the foreclosures under the subsequent mortgages for principal and interest conceded to be due, would have extinguished every interest the stockholders possessed" (pp. 674, 675).⁷

In the next suit, *MacArdell v. Olcott*, 104 App. Div. 263, the Appellate Division of the New York Supreme Court affirmed the judgment of the trial court, and said that it was "quite apparent that no defense that the" Railway Company could have interposed to the cross-bill to foreclose the Income and Indemnity Mortgage "could have been successful, and under the admission in the pleadings and upon the undisputed facts the bondholders were entitled to have the property sold;" and that it was clear that the "decree was obtained without the consent of" the old Company; and continued (p. 270):

"The Southern Pacific Company was a large creditor of the corporation, and as such became a party to this reorganization scheme. The fact that this creditor was also

⁷The plaintiffs appealed both to this Court and to the Circuit Court of Appeals. The former appeal was dismissed (150 U. S. 170), and the latter affirmed (9 C. C. A. 687). An appeal from the decision last mentioned to this Court was dismissed (161 U. S. 115).

a stockholder of the company, and controlled a majority of the stock, is no reason why it should not protect itself as a creditor of the insolvent corporation; and all of its acts, so far as disclosed by this record, were entirely justified by its relation as creditor of the corporation."⁸

In the case at bar, the District Court said (R., 279; 226 Fed. 500, 510):

"The defendant urges the validity of the foreclosure suit and disavows collusion or fraud. As has been already stated, the action of the United States Circuit Court in ordering foreclosure and sale seems to have been well founded in law and proper under the circumstances."

The Circuit Court of Appeals, in affirming the judgment of the District Court, does not accuse the defendant of unethical conduct, and expressly states "there is great force" in the contention that the defendant should receive credit for the "floating debt which it gave up." This contention was, however, overruled on technical grounds of pleading.⁹ The Court said, however, that "the reorganization was, generally speaking, wise, fair, and eventually proved very successful" (R., 486; 244 Fed. 61, 62).

⁸This decision was affirmed 189 N. Y. 368.

⁹*Infra*, pp. 28-30.

We have not only the foregoing evidence that the stockholders of the old Railway Company had no equity that was not cut off by the foreclosure, but in the following respects this case differs from the *Boyd Case*:

Here the minority stock was offered fair terms, while there the complaining floating debt creditor had been ignored.

Here the defendant secured the stock of the new company through its guaranty of the latter's securities, through its ownership of a great connecting transportation system, and through its control of the floating debt; while there the stock of the new company had been acquired through the ownership of the stock of the old.¹⁰

Here there is no evidence showing the Railway Company's property to have been worth more than its debts, but the evidence is to the contrary; while there the reorganization agreement recited the value of the mortgaged property to be more than twice the amount of the corporation's indebtedness.

Here there was a reduction, while in the *Boyd*

¹⁰As appears from the Court's statement of the *Boyd Case* (228 U. S. 482, 488):

"The representatives of the stockholders intended to resist the foreclosure, and while recognizing the superior claim of the bonds, advised that 'if properly protected, stockholders can secure equitable terms in any reorganization.'"

After the stockholders had secured what they considered equitable terms, the defense of the foreclosure suit was abandoned (*id.*, 506).

Case there was an increase, in the securities of the reorganized company.

There both the lower courts found against the contention that the mortgaged property had been sold for a fair price, while here there was no such adverse finding.

There the complainant's claim against the old company was not established until long after the foreclosure sale, so that he could not well have intervened in the foreclosure suit, while here the foreclosure suit was pending for years and the sale did not take place until more than four months, and was not confirmed until seven months, after the foreclosure decree (*MacArdell Rec.*, 210).

Finally, there the new company showed its doubt as to the validity of the reorganization by buying up, after the foreclosure decree and sale, millions of dollars of the floating debt.

The defendant took only such action in this reorganization as was necessary to protect its interests as the indirect owner of a large part of the unsecured debt of the old company. It has in no sense taken advantage of the minority stockholders or used its stock control oppressively.

III.

He who seeks equity must do equity.

The plaintiffs should not be allowed to participate in the benefits of the reorganization without sharing its burdens.

As we have seen, the advances made first by the Morgan's Company and later by the Southern Development Company to the Railway Company, for the purpose of saving it from foreclosure, constituted the principal portion of its floating debt (MacArdell Rec., 239-240). Mr. Tweed, the Chairman of the defendant's Board of Directors, testified: We continued to make advances to pay interest on the Railway Company's bonds "until we found the burden too great" (*id.*, 242).

The report, on which the Central Trust Company ascertained the amount of \$71.40 per share to be paid by stockholders of the old company to entitle them to stock in the new company, shows that the Railway Company owed the Morgan's Company \$1,644,243.56, and the Southern Development Company \$892,732.97, a total owed to both companies of \$2,536,976.53, for which they held as collateral \$880,000 of the Railway Company's General Mortgage six per cent. bonds (Carey Rec., 1095). The defendant agreed to exchange this collateral for a like principal amount of General Mortgage four per cent. bonds

of the new company; and though these four per cent. bonds were worth nowhere near par (*id.*, 1095), to apply them at par in liquidation of the indebtedness (R., 50). The two creditor companies (unlike other holders of the old General Mortgage bonds) did not receive any debentures for interest past due on the bonds thus exchanged (R., 47). This left a balance due to the two companies of \$1,656,976.53 out of a total floating debt of \$3,020,000. The acceptance of these new bonds at par in reduction of this indebtedness is another indication of the fairness with which the plaintiffs were treated by the defendant.

Both the defendant and the Southern Development Company were owned by Collis P. Huntington and his associates (Carey Rec., 751; Mac-Ardell Rec., 232, 1441). This common ownership of stock and the stock interest of the defendant in the Morgan's Company made it a matter of little moment to the parties in interest whether or not the defendant, when it took up the stock of the new company, paid the floating debt of the old company. At the time of the reorganization of the Railway Company, the defendant and the Southren Development Company were for all practical purposes the same. Mr. Tweed constantly referred to them as "we". He said: "Unfortunately for them [Southern Pacific Company] the largest floating debt creditors were the

Southern Development Company and the Morgan's Louisiana & Texas Railroad Company, controlled by the Southern Pacific Company" (Mac-Ardell Rec., 238). The trial court in the case at bar said (R., 271; 226 Fed. 500, 505):

"The Southern Pacific Company, owning the stock of and controlling the Southern Development Company, and having obtained from it the stock of the Morgan's Steamship Company, which in turn owned a majority of the Houston & Texas Central Railway Company, was in a position to waive and in fact to relinquish substantially, all claims for the floating indebtedness which had accumulated against the Houston & Texas Central Railway Company, as the amount of those debts had been advanced to a large extent by the Southern Development Company, or the Morgan's Steamship Company, or by the Southern Pacific Company itself."

The defendant asserts the fairness of the foreclosure and subsequent reorganization, and as a corollary the extinguishment of all rights claimed by the plaintiffs as stockholders of the old Railway Company. But assuming for the purpose of argument that the reorganization is invalid, then the defendant must hold the stock of the new company impressed with a trust in favor of interested parties. A majority stockholder, if trustee for the holders of the minority stock, is *a fortiori*

trustee for the holders of the floating debt. If the minority stockholders have any rights in the stock of the new company, so much the more must the floating debt creditors have greater rights. The minority stockholders cannot assert the invalidity of the reorganization as to themselves, because, as is alleged, of the relation thereto of the majority stockholder, and in the same breath assert its validity against the holders of the floating debt. This was the error into which the trial court fell. It said that the general creditors "were wiped out by the foreclosure decree" (R., 273), but that the minority stockholders were not cut off, because "the Southern Pacific Company is, in effect, the majority stockholder purchasing at a valid foreclosure sale," and had no right to refuse to allow the minority stockholders to share in the property purchased, "unless those minority stockholders agreed to join in reimbursing the general creditors of the corporation" (R., 281).

In *Central Improvement Company v. Car bria Steel Company*, 210 Fed. 696, 706 (affirmed *sub nomine Kansas City Southern Railway Company v. Guardian Trust Company*, 240 U. S. 166), the Court held the new company and its stockholder trustees for the creditors of the old company because the foreclosure sale had been made for an inadequate consideration, and said:

"The duty and liability of the majority stockholders to minority stockholders is not

less than this (*Jones v. Missouri Edison Electric Co.*, 144 Fed. 765, 771, 75 C. C. A. 631 and cases there cited), and their duty to creditors whose equitable rights and interests in the property of the corporation are superior to those of stockholders cannot be less."

If this Court should find against the validity of the reorganization and in favor of the plaintiffs' contention, still the minority stock, whose interest is subordinate to that of the unsecured debt, should not be permitted to share in the stock of the new company without making good to the defendant a *pro rata* portion of the unsecured debt that, because of its control by the defendant, has been eliminated as a charge upon the property. By reason of the fact that the defendant acquired all of the new stock, it was immaterial whether or not its claims as a floating debt creditor were enforced. True, the floating debt is now barred by laches. The plaintiffs, however, base their demand for relief upon the alleged injustice that has been done them by the defendant. If they are to share in the benefits of the defendant's action, they should likewise bear its burdens. The majority opinion of the Circuit Court of Appeals in this case said that "there is great force in this contention," but that it had not been pleaded (R., 488). The dissenting opinion called attention to the fact that the

suit was one for an accounting and that this matter was a detail of the account which did not require to be pleaded. The extent to which the matter was pleaded and the various efforts made to have the amount and ownership of this floating debt determined by the lower court are fully discussed in the defendant's main brief (Seventh Point, p. 81). But even had there been a failure to plead it, an appellate court has, when the facts of the case show a party entitled to equitable relief, "power to remand the case to the court below for an amendment of the pleadings and such further proceedings as may be consonant with justice."

Wiggins Ferry Co. v. R. Co., 142 U. S. 396, 413, where the Court further said:

"Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible. A mistaken view of one's rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice, and if the pleadings can be so amended as to admit proof of such claim, and such amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion even of the appellate court to permit such amendment to be made. *Schooner Anne v. United States*, 7 Cranch 570" (p. 415).

Even though the defendant had mistaken its "rights or remedies," should it be denied "substantial justice" for that reason, in a case where the plaintiffs' sole standing in court is based on the theory that they had been pursuing mistaken rights or remedies for a quarter of a century prior to the institution of this suit? These protracted "mistakes" on the plaintiffs' part are their only defense to the charge of laches. Judge Hough, in his dissenting opinion in this case, forcefully states the error into which the majority of the Court fell, as follows (R., 491; 244 Fed. 61, 65):

"But defendant when it took all the shares of the reorganized or new corporation, after these plaintiffs had declined to take any, certainly lost what the old company owed to the Southern Development Company and Morgan's, etc., Co., in the very real sense of having no one to pay the debts. To have caused the new or reorganized corporation to pay these debts (when Southern Pacific practically owned both debtor and creditors) would have been merely taking money out of one pocket and putting it in the other; the debts would have remained lost just the same.

"It is because this defendant owned and controlled the companies which were at once confessed creditors, and themselves the immediate controllers of the old Houston, etc.,

Railway, that liability has been imposed on defendant; but why plaintiffs should now receive their share of what defendant got, without paying their share of what defendant lost, is quite beyond me. I think such credit or allowance inheres in the very reasons for our decision. If the Southern Pacific had itself been sole unsecured creditor of and majority shareholder in the old Houston, etc., Railway, and the same kind of reorganization had occurred, it is inconceivable that the minority stock owners would have been let in without paying their share of the floating debt. Yet we seem now to admit them as shareholders, while leaving the burden of unpaid debt to be shouldered by the concern which we hold to have been (in effect) the majority owner. That the point was not pleaded, is immaterial; the matter is a detail of accounting."

By reason of the fact that the floating debt was controlled by the defendant, the question of the floating debt's attitude toward the reorganization must be answered as follows: Either this debt participated in the reorganization and the defendant acquired the new stock as a floating debt creditor, or the defendant waived the right of the floating debt to share in the new company. In either case the minority stock ought not to be allowed to share in the stock of the new company

without paying to the defendant the debt it has thus surrendered.

In *Cutting v. Baltimore & Ohio Railroad Company*, 65 App. Div. 414, 416 (appeal dismissed 177 N. Y. 552), a case relied upon by the plaintiffs, the B. & O. acquired 51 per cent. of the stock of the Staten Island Rapid Transit Company. As the consideration for the acquisition of this stock, the B. & O. guaranteed the Second Mortgage bonds of the Staten Island Company. The latter had three bond issues outstanding, as follows: First Mortgage bonds amounting to \$1,000,000; Second Mortgage bonds amounting to \$2,500,000; and Income bonds amounting to \$4,500,000. More than half of the Income bonds were owned by the B. & O. The Staten Island Company also owed the B. & O. \$1,174,032 in open account. The Court said with reference to the past-due interest on the Second Mortgage bonds:

"The B. and O. did not have on hand sufficient assets of the Staten Island company to provide for the payment of this interest, unless it made default in the payment of other demands against the Staten Island company or unless it should forego payment of its own claim against the Staten Island. The B. and O. consequently omitted to pay the interest on the second mortgage and, as the learned trial judge decided, 'actively in-

stigated' the foreclosure of the second mortgage with the purpose and intent of becoming the purchaser."

At the time the Second Mortgage was foreclosed, a year's interest was in default thereon. The B. & O. paid this interest and also an additional half year's interest falling due after the foreclosure sale. At the foreclosure sale a new company, all of whose stock was owned by the B. & O., purchased the mortgaged property. In the reorganization the minority stockholders were not offered fair terms, but were ignored. The trial court directed the entry of the following judgment (35 Misc. 616, 618):

"The plaintiffs are entitled to a transfer of the same number of shares of the new company as they hold of shares in the old company upon payment, within twenty days, of their *pro rata* share of the moneys paid by defendant, as above stated, for interest on the second mortgage bonds, subject, however, to defendant's lien for the payment of plaintiffs' *pro rata* share of the income bonds held by the defendant, as above stated, and of the defendant's open account aforesaid, such lien to be secured by pledge with the defendant of the stock transferred."

If cash payment was not made by the plaintiffs in twenty days, the Court directed that the complaint be dismissed with costs. The Appellate

Court affirmed the judgment thus directed, saying that the plaintiffs could not obtain a portion of the stock of the new company "without bearing their *pro rata* proportion of the just claims of the B. and O. against the property of the old company" (p. 416).

In order, therefore, to share in the stock of the new company, the plaintiffs were by the judgment above mentioned required to pay more than \$738, for each share of stock of the old company held by them.¹¹ Hence, although theoretically the judgment went as far in favor of the minority stockholders as any adjudicated case, practically it was a victory for the defendant.

In the case at bar, there is no inconsistency in the defendant's position. It asserts that the holders of the floating debt and *a fortiori* the holders of the stock of the old company were cut off by the foreclosure and by their failure to come into the reorganization upon the fair terms that were offered them. But should this Court take a

¹¹ The B. & O. had paid a year and a half's interest on the \$2,500,000 of Second Mortgage five per cent. bonds. This interest, exclusive of interest on the overdue coupons, amounted to.....		\$187,500
Additional amount due B. & O. on open account.....		1,174,032
Principal amount of Income bonds held by B. & O....		2,332,000
Total indebtedness of S. I. Co. to B. & O. exceeds....		\$3,693,532

The capital stock of the Staten Island Company consisted of 5,000 shares of the par value of \$100 each, so that the amount of the indebtedness to be apportioned to each share is more than \$738.

different view, then the defendant asserts that if it is a trustee, it is a trustee for the unsecured debt as well as for the minority stock; and that the plaintiffs, whose rights as stockholders are subordinate to those of creditors, should not be allowed to share in the result of the reorganization to the exclusion of the latter.

If the defendant had not acquired the new stock as the underwriter of the reorganization, it is plain that it would have established its rights through its control of the floating debt; and before the plaintiffs can successfully assert any claim against the defendant they must make good to it so much of the floating debt as it has lost. On the other hand, the plaintiffs' position is inconsistent. In their brief in the Circuit Court of Appeals they expressly admitted that the floating debt amounting "to over \$3,000,000" was "wiped out by the foreclosure." But at the same time they claimed that their rights as stockholders, which were subordinate to the floating debt, remained intact (p. 28). They also naively stated that the fact "that there was a deficiency judgment on the foreclosure sale would seem to show that" the Morgan's Company's claim against the Railway Company "was of no value at all" (p. 91).

IV.

If the plaintiffs are entitled to any decree in their favor, it should provide for payment to them in cash and not in stock.

The defendant is powerless to obey a decree directing the delivery to the plaintiffs of any of the new company's stock. This stock was pledged under the so-called French Loan March 1, 1911, more than two years prior to the institution of this suit. Although then nearly a quarter of a century had elapsed since the consummation of the reorganization, no suit had then been brought to recover any of the new stock. It never occurred to the defendant that there was any reason why the stock should not be so pledged.

A decree adjudging the plaintiffs to be entitled to a portion of the new stock would place the defendant in default under the terms of the French Loan; and the indenture securing the Loan permits the substitution of other collateral and the withdrawal of the pledged securities only "if there be then no default in respect of any provision in this Indenture or in the bonds issued hereunder" (Article Four, Sec. 2). The indenture contains the express covenant that the defendant "is the lawful owner of" the pledged securities, and that the same "are not subject to

any prior pledge, charge or equity" (Article Four, Sec. 1). For a default in the defendant's observance of the covenants of the indenture, the trustee thereof is authorized to declare the Loan due, and is compelled to do so at the request of the holders of twenty-five per cent. of the Loan (Article Five, Sec. 1). The defendant would, therefore, be unable to obey a decree directing delivery to the plaintiffs of part of the Railroad Company's stock; that is, unless the holders of the French Loan declared it due because of the default resulting from such a decree and the defendant paid the entire Loan off. For a Court of Equity to make a decree that would probably result in declaring due a 250,000,000 French franc loan that is payable March 1, 1946, and that bears only four per cent. interest, is an enormous penalty to inflict on a defendant that has been guilty of no unethical conduct; but that has, as the Circuit Court of Appeals said in this case, effected a reorganization that "was, generally speaking, wise, fair and eventually proved very successful" (R., 486).

Even though a substitution of new securities as collateral could be made, the default would not be cured; and such substitution would necessitate a re-appraisal of the entire collateral and the pledging of a large amount of additional securities to make good the shrinkage in market values that has taken place since 1911 (see defendant's main

brief, Eighth Point, p. 86). In Sec. 3 of Article Three of the indenture securing the Loan, the defendant covenants that while the Loan is outstanding it will not "sell or suffer to be sold any of the shares of the capital stock of Houston & Texas Central Railroad Company" and of its other proprietary companies; nor will it "suffer the railroad lines of any of said companies to be sold or leased, nor will it or any of said companies enter into any merger or consolidation, except (in the case of any such sale, lease, merger or consolidation) *inter se* or to or with a corporation all of whose stock other than directors' qualifying shares shall at the time be held hereunder, or to or with the" defendant. The plain intent of the indenture was that the defendant's system of railroads (including stock ownership) should remain intact during the life of the Loan.

The equities of the situation demand no such drastic treatment as would result from a decree directing delivery of the stock. The decree made by the trial court awards to the plaintiffs a share of the new stock and of all dividends thereon, upon their paying a *pro rata* share of the expenses of the reorganization exclusive of the floating debt of the old company. If such a decree had been made immediately after the reorganization, the plaintiffs would not have availed themselves of it. In *Carey v. Houston & Texas Central Railroad Company*, 52 Fed. 671, 675, the Court

called attention to the fact that the minority stockholders had "never proposed to pay anything."

The early attacks on the reorganization were confined to an effort to set aside the foreclosure. The plaintiffs made no effort to secure an interest in the new stock for nearly a quarter of a century after the consummation of the reorganization. This was doubtless due, not to a mistake as to their rights or remedies, but to an election with regard thereto, based on a realization that any decree awarding the plaintiff an interest in the new stock would also have required them to make a substantial cash payment. Now, however, that the new stock has increased in value because of the defendant's wise management and because of the traffic and other advantages the Railroad Company has received as a part of the defendant's great system of railroads, the plaintiffs' attitude has changed.

The plaintiffs now demand their pound of flesh, realizing that a minority stock interest in one of the defendant's proprietary companies will have a nuisance value far in excess of its inherent worth. As the defendant, however, is liable, if at all, not for any unethical conduct, but upon abstract principles, no harsher decree should be made than the facts compel.

V.

CONCLUSION.

As has been said by this Court, reorganizations would often fail if the old stockholders could not be induced to extend financial aid, and "the necessity of such arrangements should lead Courts to avoid artificial scruples."¹² We may go further. Not only will reorganizations often fail, but even more frequently reorganizations will become necessary, if stockholders fail to extend financial aid to their corporations in order to enable them to weather periods of temporary financial stress. The needs of a corporation and its responsibility are best known to its stockholders. If a majority of these stockholders, who have the most at stake in the success or failure of the corporation, cannot adequately protect themselves in a reorganization, where they also own a portion of the unsecured debt, manifestly they will be chary about assuming the position of unsecured creditors. Thus many a corporate bankruptcy will result that otherwise might have been avoided.

We may say of the opinions of the lower courts in this suit what was said in 1910 by the late Mr. Adrian H. Joline regarding the *Monon*

¹²*Kansas City Southern Railway Company v. Guardian Trust Company*, 240 U. S. 166, 178.

Case,¹³ in a lecture delivered at Harvard University:¹⁴

"The opinion of Justice Brewer in the Monon case stands * * * upon the pages of the reports a dangerous weapon in the hands of guerillas who hang about the outskirts of reorganizations and endeavor to levy tribute as a condition of abating the nuisance of their presence, and that even to this day, reorganizers stand in more or less terror of the Monon case, and it looms up as a perpetual spectre in their path."

The consequences to arise from the decision of this case are of great importance, not only because of the amount directly involved, but also because of the effect this decision will have upon corporate finance.

Respectfully submitted,

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Pacific Company.

¹³*Louisville Trust Company v. Louisville Railway*, 174 U. S. 674.

¹⁴*Some Legal Phases of Corporate Financing, Reorganization and Regulation*, p. 197.

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Supreme Court of the United States.

SOUTHERN PACIFIC COMPANY,
Petitioner,

AGAINST

HENRY L. BOGERT, TOWNSEND
LAWRENCE and ANITA LAW-
RENCE, as Executors under
the Last Will and Testament
of Walter B. Lawrence, de-
ceased, suing on behalf of
themselves and other stock-
holders of the Houston &
Texas Central Railway Com-
pany similarly situated, &c.,
et al.

October Term,
1918.

No. 305.

BRIEF ON BEHALF OF SOUTHERN PACIFIC COMPANY, PETITIONER.

This cause comes to this Court on *certiorari* to the Circuit Court of Appeals for the Second Circuit.

The two broad questions of general interest presented in this action are as follows:

FIRST: Should a plan of re-organization which is susceptible of two interpretations be so construed, in a suit brought by minority stockholders, that the carrying out of said plan

and compliance with the decree entered in said suit would result in restoring the property of a corporation to its bondholders and stockholders, entirely eliminating the creditors, none of whose claims are paid?

That this is the effect of the decree herein is evidenced by the fact that said decree so construes the provisions of the agreement pursuant to which the Houston & Texas Central *Railway* Company (the old company) was reorganized in 1888 as to bring about the result that after said reorganization had been effective and said decree has been fully performed said railway property is restored to the bondholders and stockholders without any payment having been made to the creditors and the property and assets of the said railway have been freed entirely from the claims of its creditors.

SECOND: Is the majority stockholder of a corporation which itself owns a majority of the stock of a second corporation a trustee for the minority stockholders of such second corporation, particularly when the only evidence of control or dictation is the election of directors?

That this is the effect of the decree is evidenced by the fact that it is entered against the Southern Pacific Company on the theory that it as majority stockholder of the Houston & Texas Central *Railway* Company (the old Company) received stock of the Houston & Texas Central *Railroad* Company (the corporation formed pursuant to the reorganization plan) as trustee for the minority stockholders of the Houston & Texas Central *Railway* Company (the corporation whose reorgan-

ization was effected by the plan, that is, the sold out company) though the undisputed evidence is that the Southern Pacific Company never was a stockholder of The Houston & Texas Central *Railway* Company, but that it was the majority stockholder of Morgan's Louisiana and Texas Railroad and Steamship Company, which owned the majority of the stock of the Houston & Texas Central *Railway* Company.

This suit was instituted in July, 1913. The complainants below are members of a Committee representing minority stockholders of the Houston & Texas Central *Railway* Company which was sold out at foreclosure sale in 1888. The defendant Southern Pacific Company is the owner of all the stock of the Houston & Texas Central *Railroad* Company (the corporation formed pursuant to the reorganization plan to take over the property acquired on the carrying out of that plan) the owner of the railway property acquired at the above-mentioned foreclosure sale, such property having been acquired in accordance with the terms of the plan of reorganization.

The relief *sought* was an accounting in which the Southern Pacific Company was to be required to account for all stocks, moneys, property, benefits and advantages which it received because of the carrying out of the Reorganization Agreement, and that on such accounting the Southern Pacific Company be credited with such moneys as it might have paid out on account of the guaranty and expenses of carrying out such reorganization and that it be given all proper credits.

The relief *accorded* in the decree complained of

is the delivery in kind to complainants of a *pro rata* of the stock of the Houston & Texas Central Railroad Company (the new corporation formed pursuant to the Reorganization Plan) in proportion to their holdings of stock in the old company on the payment of \$26 per share. This relief is essentially based on the theory that in acquiring the property in question the Southern Pacific Company acted in the character of the majority stockholder and must be considered as a constructive trustee for complainants. The position of the Southern Pacific Company is that it was not a stockholder of the sold out company. That if it can be considered as possessing the character of a stockholder (because it was the stockholder of a stockholder of the sold out company) it cannot under the circumstances be regarded as having purchased the properties sold at the foreclosure sale in the character of a stockholder, and the effect of so regarding it is to convert an admittedly fair and reasonable plan of reorganization into an illegal scheme for shutting out unsecured creditors and to operate a great injustice upon it for the benefit of minority stockholders who refused to come in and participate in the sale upon terms concededly fair and reasonable.

The decree of the Circuit Court of Appeals affirmed the decree of the United States District Court for the Eastern District of New York. Judge Hough dissented upon one point, and reluctantly concurred on another.

A motion for reargument upon various grounds was made and denied. *Certiorari* was issued by this court to the Circuit Court of Appeals for the Second Circuit on January 12, 1918, and the case comes on for hearing upon the record filed in response to the writ.

STATEMENT OF FACTS.

A proper understanding of the facts is essential, but in stating them it is necessary to cover the happenings during a considerable period, including the early history of the Houston & Texas Central Railway Company, its reorganization, and also the many litigations in respect thereto instituted by certain stockholders. These facts are numerous and complex and unfortunately cannot be stated in narrow compass. In what follows we have endeavored to compress the same into the smallest possible limit.

EARLY HISTORY OF HOUSTON & TEXAS CENTRAL RAILWAY COMPANY.

The Houston & Texas Central Railway Company (hereinafter called the Railway Company) is a corporation organized and existing under the laws of Texas, having been originally incorporated under the name of Galveston & Red River Railway Company by a special act of the Legislature of Texas, approved March 11, 1848. This name was changed in 1856 to Houston & Texas Central Railway Company. The Railway Company owned and operated three lines of railroad all in the State of Texas: A "Main Line" from Houston to Dennison, a "Western Division" from Hempstead to Austin and a "Waco and Northwestern Division" from Bremond to Ross. (*MacArdell Record, Exhibit E, fols. 3356-7.*) It was the owner of lands which were granted it by the State of Texas, amounting to some 4,500,000 acres (*MacArdell Record, Exhibit E, fols. 4821, 4830*), but title to a large part was in dispute. (*MacArdell Record, Exhibit E,*

Answer of Central Trust Company, fol. 346, Answer of Southern Pacific Company, fol. 649.)

In 1877 one Charles Morgan transferred his very considerable railway interests in Texas and Louisiana, including a majority of the stock of the Railway Company, to Morgan's Louisiana & Texas Railroad and Steamship Company (hereinafter called the Morgan Company). In 1883 a majority of the stock of the Morgan Company was purchased by the Southern Development Company, which in turn sold such stock to Southern Pacific Company in 1885. The Morgan Company at the time of such purchase owned not only a majority of the stock of the Railway Company, but also a majority of the stock of a number of other railroad lines in Texas and Louisiana, essential to the proper operation of a transcontinental route, and also various steamship lines. The Southern Pacific Company therefore never was a stockholder of the Railway Company though it controlled the same by reason of its ownership of a majority of the stock of the Morgan Company, which in turn owned a majority of the stock of the Railway Company. (*MacArdell Record, Exhibit E, Mr. Tweed's testimony, Vol. I, p. 231.*)

The Railway Company had an authorized capital stock of \$10,000,000 of which \$7,726,900 was issued and outstanding. In 1885 its property was subject to seven mortgages securing issues of bonds. Two of these mortgages covered all the lines of railway and land grants and other property of the Railway Company (*MacArdell Record, Exhibit E, fols. 3390-3507*). These mortgages were known respectively as, (1) Main Line First Mortgage, (2) Main Line and Western Consolidated Mortgage, (3) Western Division First Mortgage, (4) Waco

and Northwestern First Mortgage, (5) Waco and Northwestern Consolidated Mortgage, (6) Income and Indemnity Mortgage, and (7) General Mortgage.

The amount of the principal of such bonded debt, as established by the decree of May 4th, 1888, hereinafter mentioned, was \$20,165,000; but of this amount \$666,000 of the Main Line and Western Consolidated Bonds and \$1,499,000 of the Income and Indemnity Bonds were pledged with the Trustee of the General Mortgage, having been surrendered to it on delivery of a like amount of General Mortgage Bonds, so that the net amount of the principal debt outstanding was \$18,000,000. The total amount of the annual interest charge being \$1,261,440.

The Railway Company was also indebted to the State of Texas in a sum which the State claimed to be \$460,000 and the Railway Company admitted to be \$190,000 secured by a mortgage on seventy-five miles of railway (*MacArdell Record, Exhibit E, Decree, Vol. II, p. 843*).

At the close of the year 1884, the net result of the operation of the railroad from January 1, 1881, was a deficiency (after payment of interest on bonded debt) amounting to \$2,663,474.36 (*MacArdell Record, Exhibit E, Mr. Tweed's testimony, Vol. I, p. 262*).

The large deficiencies resulting from the operation of the Railway Company had been made up from time to time by loans and advances from the Morgan Company and the Southern Development Company, subsidiaries of the Southern Pacific Company, in an effort to try to save the property from foreclosure. At the beginning of 1885, the total floating debt of the Railway Company, including

the above mentioned claims of the Morgan Company and Southern Development Company, was about \$3,000,000 (*MacArdell Record, Exhibit E, Mr. Tweed's testimony*, Vol. I, p. 958).

The claims of the Morgan Company and Southern Development Company were reduced to judgments in 1889, and executions were issued thereon which were returned "*nulla bona*" (*Record, Transcripts of judgments, Exhibits H and I, fols. 775-786*).

It is stipulated in this case that the amounts for which such judgments were entered were found by the Special Master in the foreclosure suit to be justly due and owing from the Railway Company to these creditors, hence there is and can be therefore no suggestion made reflecting upon the *bona fides* and justice of the claims of the floating debt creditors (*Record, fols. 695-699*).

DEFAULTS UNDER THE VARIOUS MORTGAGES AND PROCEEDINGS TO ENFORCE THE SAME.

In January, 1885, default was made in the payment of interest on the Main Line and the Western Division, First Mortgages, neither of which contained a provision for the acceleration of the maturity of the principal upon default and both of which provided that in case of default the land grants covered should be sold prior to the railroad. Thereafter, and in February of that year, actions were brought by the Trustees for the purpose of enforcing the trusts in said mortgages. The Railway Company appeared and answered said bill (*MacArdell Record, Exhibit E, Vol. II, pp. 920, 970, 953, 1005*).

Immediately thereafter the Southern Development Company filed a creditors' bill and obtained the appointment of receivers who took possession of

the road (*MacArdell Record, Exhibit E, Vol. II, p. 1062*).

Later Farmers Loan and Trust Company, as Trustee of two other mortgages, filed bills for the purpose of enforcing the trusts thereunder, and answers to these bills upon the merits were filed by the Railway Company (*MacArdell Record, Exhibit E, Vol. II, p. 1130*).

Early in 1886 foreclosure bills were filed by the Trustees of the mortgages who had already filed the bills above mentioned. In May, 1886, the foreclosure actions were consolidated and receivers were appointed thereunder. Answers were filed, the various trustees claiming conflicting liens and the Railway Company asserting by its answer that the principal had not and could not be matured and that the railroad could not be sold until the land grants had been disposed of. Meanwhile defaults had been made in the remaining mortgages, but no bills were then filed to enforce the same as the entire property was in the possession of the court under the foreclosure bills above mentioned.

The issues raised by the answers in the foreclosure suits necessitated the taking of a large amount of testimony in Texas, New York and elsewhere, and this was not completed until the spring of 1888 (*MacArdell Record, Exhibit E, Vol. I, p. 281; Vol. II, pp. 670, 754, 780, 1085, 1159-1201*).

PLAN OF REORGANIZATION.

In the meantime the property was being operated at a loss and all parties interested appreciated that some arrangement was necessary to terminate the impossible situation. Consequently counsel for the various issues of bonds and the chief creditors, namely the Morgan Company and the Southern

Development Company, both subsidiaries of the Southern Pacific Company (counsel for which was also general counsel for the Southern Pacific Company) conferred and, after nearly two years of negotiation, a plan of reorganization was promulgated under date of December 20, 1887 (*Record, fols. 80-170*). This plan by April, 1888, had been assented to by a very large percentage of the outstanding bonds (*MacArdell Record, Exhibit E, Vol. II, p. 919*).

The plan took the form of an agreement between the holders of the various outstanding issues of bonds, Central Trust Company of New York, and Southern Pacific Company, and recited that Central Trust Company was to perform the duties now usually taken care of by reorganization managers, and that the Southern Pacific Company "was interested in connecting roads in conjunction with which it desired the railway to be operated".

The main features of the plan were that all existing mortgages (with the possible exception of the Waco and Northwestern First Mortgage) should be foreclosed and a new company organized. That Central Trust Company should act as purchasing trustee and perform certain duties imposed upon it by the agreement. That the First Mortgage bondholders should accept new five per cent. Firsts, par for par, for old seven per cent. Firsts, and receive a bonus of fifty dollars per bond in consideration of the reduction of the interest rate. That the Consolidated Mortgage bondholders should accept new six per cent. bonds, par for par, for their old eight per cents and fund their past due interest at three-fourths of its face amount, in debenture bonds bearing six per cent. interest. That the General Mortgage bondholders should accept

four per cent. bonds, par for par, for their old sixes and fund their past due interest at two-thirds of its face amount, in four per cent. debentures. The priorities of the several new mortgages to be substantially the same as those of the old. The payment of the interest upon the new bonds and of the principal and interest of the debentures was to be guaranteed by the Southern Pacific Company (*Record, fols. 80-170*).

The advantages of this reorganization to the old company and to all stockholders are apparent. By it the Railway Company was released from the payment of nearly \$700,000 interest past due. The payment of some \$1,200,000 more of past due interest was postponed and its future bond interest charges were reduced more than \$300,000 a year. Also, the time of payment of the principal of \$8,064,000 First Mortgage Bonds was postponed from 1891 to 1937 (*Gernsheim case, Exhibit C, p. 219*).

A concise statement of the benefits accruing to the stockholders by reason of the plan is contained in Judge PARDEE's opinion in the Carey case, hereafter mentioned, in 45 Fed. Rep. 438, at page 443, as follows:

"The arrangement provided by the reorganization agreement seems to have been the best possible for all the creditors of the defendant company; also the best for the company and the stockholders—best for the stockholders as it provides for refunding the bonded debt on longer time, at a reduced rate of interest, and allows each stockholder to retain his stock and his interest in the company, its railway and lands, upon paying his *pro rata* share of the floating indebtedness and the expense of the reorganization. A foreclosure and sale for the payment of interest would have closed out all

the interest of the stockholders in the company. This result has been avoided by the reorganization. Without payment of the floating indebtedness, the stockholders could not hope to retain any interest in the company, and this floating indebtedness is practically all that they are required to pay."

While the stockholders were not parties to the reorganization agreement provision was made for their benefit whereby each and everyone of them—minority as well as majority—might receive his proportion of the stock of the new company (which was to be \$10,000,000) upon contributing his proportionate share of (a) The expenses of reorganization, and (b) The floating debt of the company.

That this arrangement was fair and equitable, appears from an analysis of it.

The floating debt was a claim which had precedence over the stock, and had to be met and paid or the stock would necessarily be rendered utterly valueless. The stockholders were not called upon to pay any principal of the outstanding bonds.

It was provided that the stockholders should have the first and primary right, upon paying *pro rata* (1) the debts ahead of the stock and (2) the reorganization expenses (the amount of which was to be determined by the Central Trust Company by methods set forth in the plan), to take the stock of the new company *pro rata*; the capital stock being increased from \$7,726,900 then outstanding to \$10,000,000, and the stockholders taking their ratably increased proportion of the new stock.

If and so far as the stockholders should not see fit to exercise this privilege the floating debt creditors, who were next in order, upon paying *pro rata* the reorganization expenses, should be entitled to

their *pro rata* share of the stock of the new company.

If and so far as both the stockholders and the floating debt creditors refused to redeem the stock of the new company by payment of the sums necessary to cancel the indebtedness ahead of their respective interests, provision was made to the effect that before the stock should be offered for sale generally, the Southern Pacific Company might, if it so desired, acquire the same upon payment of the expenses of the reorganization. But if it refused to make such payment the Central Trust Company was to offer said stock for sale generally in the market. The Southern Pacific Company also agreed under the plan of reorganization to guarantee the interest on the new bonds and the principal of and interest on the debentures representing the funding of matured and unpaid interest.

Under the plan of reorganization the Southern Pacific Company could acquire the stock of the new company only after both the floating debt creditors and the stockholders of the old company had refused to avail themselves of the provisions for their benefit.

CONDITIONS IN APRIL, 1888.

The situation in the latter part of April, 1888, was as follows:

The foreclosure suits filed by the various trustees had been pending for over two years and a decree in those suits could no longer be avoided. The answers interposed by the Railway Company had served their purpose of delaying the decree until an adjustment could be effected with the bondholders. The April Term of the Court was in session and the mortgage trustees insisted upon an im-

mediate decree. If any decree was to be entered, it was to the interest of all parties, and not least of the Railway Company, that the foreclosure should be under all existing mortgages. Accordingly, on April 30th, 1888, bills were filed to foreclose the Income and Indemnity Mortgage and new bills and cross bills to foreclose the Main Line and Western Consolidated Mortgage and the Waco and Northwestern Consolidated Mortgage, alleging in each of these cases default in the payment of both principal and interest. These bills were duly answered by the Railway Company (*MacArdell Record, Exhibit E*, Vol. I, p. 587, Vol. II, pp. 607, 610, 644, 666, 667 and 669).

All mortgages, except the Waco and Northwestern First Mortgage, were under foreclosure for default in the payment of principal, and the latter mortgage was under foreclosure for default in the payment of interest. On May 3, 1888, the parties offered their evidence in open court, much of it having been taken on deposition prior to that date (*MacArdell Record, Exhibit E*, Vol. II, p. 1201).

ENTRY OF DECREE OF FORECLOSURE AND SALE THEREUNDER.

On May 4, 1888, upon the pleadings and proofs, the Court made its decree of foreclosure and sale (*MacArdell Record, Exhibit E*, Vol. II, p. 835).

Complainants insist that this decree was a consent decree and that the active co-operation of Southern Pacific Company, which owned a majority of the stock of the Morgan Company, which in turn owned a majority of the stock of the Railway Company, was necessary to overcome the defenses contained in the answers of the Railway Company. An examination of the record will show that the complainants in the foreclosure action were absolutely en-

titled to a decree at that time, regardless of these answers. The bills, with but one exception, all alleged default in payment of both principal and interest and the principal defense relied upon in the answers filed by the Railway Company was the provisions of the mortgages requiring sale of the land grants to be made before that of the railway property. Such a provision is an attempt to deprive the court of equity of jurisdiction to administer relief upon due application to it by the party aggrieved. Such an attempt to limit the jurisdiction of a court of equity by inserting a provision to this effect in an agreement has been held in this Court to be invalid.

*Guaranty Trust, &c., Co. vs. Green Cove
Railroad Co., 139 U. S. 137.*

That such answers were insufficient to prevent the entry of the decree was later held by Judge Pardee (the Judge who presided at the hearing and who signed the decree of 1888) in the case of *Carey v. Houston & Texas Central Railway Company*, 52 Fed. Rep. 671, hereinafter referred to. But, as a matter of fact, the answers had performed their functions in delaying the entry of a decree and of permitting the holding together of all the property of the Railway Company until a comprehensive plan of reorganization had been worked out.

The sale under the foreclosure decree was had in November, 1888, and the property was bought on behalf of the parties to the reorganization.

FURTHER PROCEEDINGS UNDER THE PLAN.

Meantime, the Central Trust Company, pursuant to the provisions of the plan, determined the

amount of the charges prior to the stock and gave notice that in order to raise the amount necessary to take care of such prior obligations, so as to entitle stockholders to the stock of the new company, it would be necessary to pay an assessment of \$73.00 per share (*MacArdell Record, Exhibit E, Mr. Tweed's testimony*, Vol. I, pp. 230-243; *stipulation, minutes*, Vol. I, p. 98).

The assessment in the abstract seems large, but it must be remembered that the capitalization of the Railway Company was very small for a railroad of its length, and it had a very large outstanding floating debt. In litigations hereinafter mentioned it was held that because this assessment had been fixed by certain officers and not by the directors of the Trust Company it was not its act as required by the plan. In consequence a new determination was made by the Trust Company and the amount then fixed at \$71.40 per share, the difference being occasioned by an adjustment of interest. This determination has been upheld by all courts.

No stockholder or creditor availed himself of the rights given under the plan, and accordingly the Southern Pacific Company accepted the opportunity offered it, in case the stockholders and creditors refused to act, of acquiring such stock of the new company pursuant to the provisions of said plan. It paid, as it was required to do, all the cash requirements of the plan—\$2,606,615.77—and guaranteed the new bonds as required by the plan. It is apparent that this act was performed by it as a interested third party, not as a stockholder of the Railway Company, but as a *banker or underwriter*. In accordance with the provisions of the plan, by reason of the payment made as aforesaid,

the entire \$10,000,000 of stock of the new company was delivered to the Southern Pacific Company.

It is this stock, or a portion of it, which the decree directs to be turned over to the complainants, each and everyone of whom failed to avail himself of the rights afforded by the plan of reorganization, and by the provisions of the decree said stock was impressed with the trust in favor of such stockholders, although all their rights in and to the property and assets of the Railway Company were cut off by the decree of foreclosure and sale which has been declared by all courts having jurisdiction of the litigations hereinafter mentioned to be valid and binding and not tainted by fraud, and which the complainants in this case claim is in no way assailed or questioned by their present bill.

Thereupon and pending the litigations hereinafter mentioned the Houston & Texas Central Railroad Company was incorporated and the purchasers at the foreclosure sale conveyed the railway to it.

THE LITIGATIONS.

The plan had been promulgated December 20, 1887, and was extensively advertised for months (*Carey Record, Exhibit B*, pp. 1012-1019), every possible effort being made to bring it to the notice of all parties in interest. That complainants knew of the plan immediately after its promulgation appears from their own complaint (*Record, fol. 59*), still it was not until 1889, and after the announcement of the assessment above mentioned, that any action was taken inimical thereto, thus indicating clearly that the objection of these stockholders was not to the plan but to the amount of the assessment necessitated thereby,

the validity of which was viciously attacked in the Gernsheim cases. The amount of this assessment as ultimately fixed has been upheld in all courts.

(1) *The Gernsheim cases:*

In September, 1889, Michael Gernsheim, one of the respondents herein, began suit in the Supreme Court for New York County on behalf of himself and of others similarly situated to vacate the decree of foreclosure and to restrain the carrying out of the reorganization agreement. On a motion for a temporary injunction Mr. Justice PATTERSON held that the court had no power to review or to vacate the decree, but that upon the question whether the so-called assessment upon the stock was excessive the plaintiff had the right to be heard, and he, therefore, granted an injunction restraining delivery of the new stock pending the trial of the action (*Gernsheim vs. Olcott*, 7 N. Y. Supp. 872). The defendants appealed to the General Term, and, thereupon, the order was reversed, the Court holding that Justice PATTERSON was correct in his decision that the Supreme Court could not review or vacate the foreclosure decree, but that he was in error in deciding that the plaintiff could litigate in that action the question as to the amount of the so-called assessment (*Gernsheim vs. Olcott*, 31 N. Y. State Rep. 321).

Upon trial of the issues in this case the Court at Special Term held that the so-called assessment had not been regularly made because the Trust Company had delegated its functions in that regard to certain of its officers and employees.

It will be observed that the declaration of the amount which the stockholders were required to

pay as a condition of receiving stock of the new company was in no sense an "assessment". It was an ascertainment of a definite sum, viz., the debts to be paid. An "assessment" is arbitrary.

Thereafter a careful inquiry was made by the Trust Company which resulted in a declaration that the amount required was equivalent to 71.4 per cent.

Gernsheim and associates then began another suit attacking the revised assessment and applied for a new injunction *pendente lite*, but the application was denied and such denial affirmed on appeal (*Gernsheim vs. Central Trust Co.*, 40 N. Y. State Rep. 967).

(2) *The MacArdell case:*

After the failure of the Gernsheim suits an action was begun in 1891 by Cornelius MacArdell, on behalf of a stockholders' protective committee, in the Supreme Court of the State of New York. This suit appeared on the calendar early in 1892, but it was not moved for trial until March, 1902, and upon such trial judgment was given for the defendants. The Supreme Court at Special Term in its decision dismissing the complaint upon the merits placed the same upon the grounds (1) that the suit was in effect brought to set aside or avoid a valid decree of foreclosure and sale, and to have it determined that the purchasers held the property as trustees for the stockholders of the mortgagor, and that the decree and sale thereunder were final and conclusive as to the plaintiff; (2) that the decree was made and the proceedings thereunder were had without fraud, collusion or wrongful conduct on the part of any of the defendants, and that the title was not subject to any trust for the benefit of stock-

holders of the old company. An appeal was taken from such judgment to the Appellate Division, and the judgment affirmed, and from such affirmance a further appeal was taken to the Court of Appeals, which resulted in an affirmance of the judgment by a divided court in October, 1907 (*MacArdell vs. Olcott*, 189 N. Y. 368).

(3) *The Carey case:*

In 1889 Stephen W. Carey and other members of the stockholders' protective committee filed a bill in United States Circuit Court for the Eastern District of Texas on behalf of themselves and all others similarly situated. In the amended bill of complaint it was alleged among other things that the decree of foreclosure and sale theretofore given in the foreclosure action in Texas, bearing date May 4th, 1888, was fraudulent and void, that the reorganization agreement was a fraud upon the stockholders of the Houston and Texas Central Railway Company, and the amount fixed by the Central Trust Company as payable by the stockholders of the old Railway Company in order to entitle them to acquire stock of the new Railroad Company was wrongfully and fraudulently contrived and made out as part of a scheme and plan for obtaining possession of the old Railway company. The amended bill prayed, among other things, that said decree of foreclosure and sale and the sale thereunder of the property covered by the mortgages, being all the property of the Houston & Texas Central Railway Company, be vacated and set aside; that the defendants in said suit be enjoined from delivering or disposing of any of the bonds or stock of the new Railroad Company provided for in the reorganization agreement. The motion for an injunction

pendente lite was heard and denied (*Carey vs. H. & T. C. Railway Co.*, 45 Fed. Rep. 438). The cause was afterwards heard on the pleadings and proofs, and the bill was dismissed on the merits (*Carey vs. H. & T. C. Railway Co.*, 52 Fed. Rep. 671).

In the course of the opinion in the latter case Judge PARDEE, at page 675, said:

"Complainants contend that the decree complained of was a consent decree obtained by collusion between the creditors of the company and the Southern Pacific Company, by which the defendant railway company was precluded from making proper defenses to the suits for foreclosure. This contention is not borne out by the proofs. *The answers of the Railway Company were not withdrawn.* Testimony in the suit was taken; in fact the record teemed with evidence in the nature of admissions by all parties tending to show the justice of the creditors' demand and the fact that the railway company had no meritorious defense. The vast amount of floating debt was not and could not be denied. The insolvency of the company and its utter inability to pay its just debts and maintain the property as a going concern was admitted on all hands and could not have been truthfully denied. The sale and reorganization of the property was considered essential in the interest of all concerned. The question of whether or not the principal of the bonds secured by the first Main Line and Western Division mortgages was or had become due because of the defaults of the company and its general failure to comply with its agreements was, it is true, an issuable fact, but at the same time it was a fact of minor importance because the sale of the property was necessary on account of the default of the company in the payment of interest upon its other bonds secured by mortgages upon which it was undoubted the principal had become due and because of the

large admitted floating debt pressing for payment. It was of little interest to the stockholders of the Houston & Texas Central Railway Company (who so far as the record shows never proposed to pay anything) whether the principal of the first Main Line and Western Division mortgages was declared due or not when the interest thereon past due was an amount far beyond the ability of the company to meet and for which a foreclosure was inevitable, and which with the foreclosures under the subsequent mortgages for principal and interest conceded to be due would have extinguished every interest the stockholders possessed." (*Italics ours.*)

Complainants took two appeals from this decision, one to the Supreme Court of the United States, and one to the United States Circuit Court of Appeals for the Fifth Circuit. The first mentioned appeal was dismissed (*Carcy vs. H. & T. C. Ry. Co.*, 150 U. S. 170). The appeal to the Circuit Court of Appeals was heard, and on June 5, 1894, the decree was affirmed (*Carcy vs. H. & T. C. Ry. Co.*, 9 U. S. Circuit Ct. of Appeals Reports, 687). Complainants then appealed to the Supreme Court of the United States, and their appeal was dismissed March 2, 1896 (*Carcy vs. H. & T. C. Ry. Co.*, 161 U. S. 115).

(4) *Lawrence case:*

After the decision of the Court of Appeals in the MacArdell case, and in 1908, Walter B. Lawrence, who was a member of the stockholders' committee and a depositor therewith, brought an action in the Supreme Court of Nassau County against the Southern Pacific Company; Olcott, purchaser of the property at the foreclosure sale, and three trust

companies to whom Olcott had executed conveyances of his interest in the land grants for the purpose of affording further security for the mortgages executed by the new railroad company pursuant to the Reorganization Plan, to wit, Central Trust Company, Farmers' Loan and Trust Company and the Metropolitan Trust Company, in which it was attempted to set up (1) a cause of action against the Southern Pacific Company for an accounting and (2) a cause of action against Olcott for a reconveyance of the lands purchased by him at the foreclosure sale.

Mr. Olcott died during the pendency of this action and, it being impossible to revive the same against his executors, a motion was made to dismiss the complaint. This was denied upon the ground that the two separate causes of action set forth above were embraced in the complaint and that, though no relief could be had in regard to the second, in the absence of Mr. Olcott's representatives, the former could be disposed of without their presence (*Lawrence Record, Exhibit F*, pp. 61-65).

Prior to Mr. Olcott's death a plea had been interposed setting up that the Houston and Texas Central Railway Company joined as a party, but which had not been served and was not before the court, was an indispensable party. This plea was heard on an agreed statement of facts and the United States District Court sustained the same and made an order *nisi* directing that unless the Houston & Texas Central Railway Company appear or be brought in within a time fixed therein, the bill be dismissed. Complainants failing to serve or to procure the appearance of the Houston & Texas Central Railway Company within the time

so limited the bill was dismissed (*Lawrence vs. Southern Pacific Co.*, 180 Fed. Rep. 822). From the decree dismissing the bill an appeal was taken to the Supreme Court of the United States, which court, after hearing argument, dismissed the appeal for want of jurisdiction. During the pendency of the appeal in the Supreme Court the plaintiff Lawrence died and the action was revived in the name of his executors (*Bogart vs. Southern Pacific Co.*, 228 U. S. 137).

In none of the foregoing actions was any claim made that physical delivery of the stock of the new company obtained by the Southern Pacific Company at the time of the reorganization should be had, and it was not until after the commencement of the present suit that such a claim was advanced.

PLEADINGS AND PROCEEDINGS IN THIS ACTION.

In the present action it is sought to hold Southern Pacific Company as majority stockholder and to impress a trust upon the \$10,000,000 of stock of the new company which it received in consideration of the payment by it of \$2,602,615.77 in cash and the guaranteeing of certain of the bonds of the new company after stockholders and creditors had refused to avail themselves of the provisions of the plan. This action was brought by Lawrence's executors on behalf of the committee of minority stockholders of the Railway Company, which had actively conducted all the litigations before mentioned. A comparison of the bill of complaint herein, with that in the Lawrence case, (*Lawrence Record, Exhibit F*, pp. 2-25), discloses them to be substantially the same with the addition here of allegations in regard to the prior litigations. The prayers for relief are

identical, except that the present bill omitted that contained in the Lawrence case for the return of the land grants which were never conveyed to the new company, but were transferred to the trustees of its mortgages as further security for the three issues of bonds provided for in the plan. It will be noted that there is no prayer for the *delivery* of any stock, but the bill contemplated a cash settlement. The prayer is as follows: (as it was in the Lawrence case)

First: That the \$10,000,000 of stock delivered to the Southern Pacific Company in accordance with the provisions of the reorganization plan, and its profits and earnings, be adjudged to be held by it as Trustee for the minority stockholders of the Railway Company who may come in "in accordance as the respective rights of the defendant, Southern Pacific Company, and said minority stockholders may be adjusted by the court".

Second: For an accounting in which the Southern Pacific Company shall be required to account for all stocks, moneys, property, benefits and advantages which it received because of the carrying out of the reorganization agreement, and that on such accounting the Southern Pacific Company be credited with such moneys as it may have paid out on account of the guarantee and expenses of carrying out such reorganization, and that it be given all proper credits (*Record, fols. 76, 77*).

It will be noted that the relief is simply for an accounting and no suggestion of delivery of any *pro rata* of the shares of stock received upon the reorganization. The demand for such relief came

as an afterthought, and it was first claimed upon certain of the hearings on the trial of the main issue.

The answer interposed various denials and set up a number of separate defenses; the most important of which were (a) absence of an indispensable party (Houston & Texas Central Railway Company, the old Company), (b) election and estoppel, (c) laches and notice, and (d) *res adjudicata*.

A motion was made on behalf of the Southern Pacific Company to dismiss the bill of complaint upon the ground that it appeared on the face thereof that the old Railway Company was an indispensable party and that complainants and their testator were guilty of laches. (*Record, fols. 400-410*). This motion was denied without prejudice to a motion for the trial of any separate defenses prior to the taking of testimony upon the principal issues (*Record, fol. 421*).

When the suit was called for trial, a motion was made on behalf of the defendant for a hearing on certain of the separate defenses. This motion was granted; both sides thereupon offered such proof as they desired on the trial of said defenses (*Record, fols. 424-609*). The court overruled the motion for judgment on said separate defenses, with leave to the Southern Pacific Company, at the close of the testimony in the entire case, to renew said motion for judgment (*Record, fol. 637*), but directed a trial of the entire issue (*Record, Opinion, fols. 610-632*). Thereafter a trial was had, each party offering such proof as they desired, by way of stipulation, testimony, oral and written depositions (*Record, fols. 646-786*). The court rendered an opinion by which it directed the entry

of an interlocutory decree, and thereafter such decree was entered finding that Southern Pacific Company was majority stockholder of the Railway Company and received the \$10,000,000 of stock of the new company as Trustee, and the minority were entitled to their *pro rata* share therein on payment only of their proportion of the cash paid out by the Southern Pacific Company (*Record, Opinion, fols. 787-850; Interlocutory Decree, fols. 851-870*).

While the bill of complaint apparently contemplated only the payment of such sum as to which the complainants, upon an accounting, would be entitled after crediting the Southern Pacific Company "with moneys actually paid out in connection with the reorganization agreement", the interlocutory decree, on the theory that the Southern Pacific Company received the stock as majority stockholder of the Railway Company, directed the physical delivery of shares of stock. It fixed the cost of the stock of the new company to the Southern Pacific Company at the amount paid out by it in cash in carrying out the reorganization agreement without crediting it or permitting it to avail itself of the judgments entered against the old Railway Company in favor of the Morgan Company and the Southern Development Company, though it was by reason of the holding by the Morgan Company of a majority of the stock of the old Railway Company that the Southern Pacific Company had been held to be majority stockholder. Said decree appointed a Special Master "to take testimony and report the amount of dividends and profits received by the defendant Southern Pacific Company upon the common stock of the Houston & Texas Central Railroad Company, to which under

this decree the complainants * * * and the other stockholders who may be brought in as future parties plaintiff, are entitled" (*Record, fol. 863*). The amount of cash actually paid out by the Southern Pacific Company on the reorganization was not the subject of the accounting, the figures in the answer of the Southern Pacific Company having been accepted for this purpose. Exceptions to this interlocutory decree were duly filed (*Record, fols. 873-893*).

It appearing that the entire stock of the new company (Houston & Texas Central Railroad Company), physical delivery of a part of which was thus ordered, had been pledged in 1911—two years before the commencement of this action—to secure an issue of bonds amounting to 250,000,000 francs, taken by certain French bankers and known as the "French Loan", the Master was also directed to inquire into the facts concerning this pledge. Testimony before the Master tending to show that any attempt to release this stock from the French Loan, would by its terms precipitate the maturity of the loan, if the banks desired to take such action, or, even if this were not the case, that to secure possession of such stock the Southern Pacific Company would be obliged to pledge additional collateral to the value of about \$5,000,000 was offered before the Special Master. This was rejected and exception taken to such rejection (*Record, fols. 1006-1049*).

During the pendency of the hearings before the Special Master, the respondents, Gernsheim, Rosenfeld and Cohn, claiming to be stockholders of the Railway Company not represented by the complainants, filed petitions praying for leave to intervene. Answers were filed and orders en-

tered directing the Special Master to take proof of the allegations of the petitions and answers and include his findings in his report (*Record, fols. 1093-1161*). Such testimony having been taken (*Record, fols. 1162-1236*), the Special Master filed his report (*Record, fols. 1285-1296*), to which the Southern Pacific Company filed exceptions (*Record, fols. 1297-1308*). This report, upon motion, was confirmed (*Record, fols. 1309-1313*), and thereupon the final decree was entered (*Record, fols. 1315-1328*), which admitted petitioners as parties plaintiff and directed physical delivery of the stock on payment by the plaintiffs of \$26.026 and interest from February 26, 1891, for each share of stock delivered, such amount being the *pro rata* share only of the cash actually paid by the Southern Pacific Company for reorganization expenses, and failing to take into account in any way the amounts which it relinquished in order to put the reorganization through, to wit: the floating debt it controlled.

Thereupon motion was made by the Southern Pacific Company praying to be released from such of the provisions of the decree as required physical delivery of the stock, and that in lieu thereof it be decreed to pay its value upon the ground that the hardship on the defendant in endeavoring to release the stock from the French Loan was incommensurate with the advantages to the plaintiff (*Record, fols. 1329-1353*). The District Court did not dispose of this motion and the order thereon contained the following reservations:

"FURTHER ORDERED, that the motion of the defendant to fix an alternate value in place of the physical delivery of the stock, is denied for the present, that is,

(1) Pending the taking of an appeal with application for supersedeas and stay, or

(2) Unless the defendant asks to proceed under the decree and waives his right to appeal, or

(3) Until this Court, without regard to the question of appeal by the defendant, proceeds at the foot of the decree to make further order to carry it into effect," (*Record, fol. 1368*).

From the final decree the Southern Pacific Company duly assigned error, and assignments of error were duly filed by the Southern Pacific Company (*Record, fols. 1369-1413*), which thereupon appealed to the Circuit Court of Appeals for the Second Circuit. That court affirmed the decree of the District Court (*Record, Majority Opinion, fols. 1457-1480; Opinion of Judge Hough, dissenting in part, fols. 1481-1495*). Judge HOUGH in his opinion stated that inasmuch as the Southern Pacific Company had been held as a majority stockholder of the Railway Company, the title to the stock of which was in its subsidiary, the Morgan Company, it was on principles of equity entitled to reimbursement for what it relinquished in permitting the foreclosure decree to be entered and thus wipe out the debt of the Morgan Company evidenced by the judgment hereinbefore mentioned. He further stated that in his opinion the Court below had committed error because it refused to consider the matter at all.

The majority opinion of the Court on this point was as follows:

"(3) The defendant insists that it should receive credit for so much of the railway company's floating indebtedness as it gave up to carry the reorganization through and that the minority stockholders should be assessed for their proportionate share of it. There is much

force in this contention as stated. The trouble is that it was never raised in the case by pleading or otherwise until the exception was taken to the report of the Special Master. There is nothing in the record to show what, if anything, the Southern Pacific did give up.

* * * Under these circumstances it is quite impossible to say what, if anything, the Southern Pacific gave up in connection with the Railway Company's floating indebtedness (*Record, fols. 1470-4*)".

Judge HOUGH's opinion upon the same point, was as follows:

"It is because this defendant [Southern Pacific Company] owned and controlled the companies which were at once confessed creditors and themselves the immediate controllers of the late Houston &c., Rwy., that liability has been imposed on defendant; but why plaintiffs should now receive their share of what defendant got without paying their share of what defendant lost is quite beyond me. I think such credit or allowance inheres in the very reason for our decision. If the Southern Pacific had been sole unsecured creditor of and majority shareholder in the late Houston &c. Rwy. and the same kind of a reorganization had occurred—it is inconceivable that the minority stock owners would have been let in without paying their share of the floating debt. Yet we seem now to admit them as shareholders while leaving the burden of the unpaid debt to be shouldered by the concern which we hold to have been (in effect) the majority owner. That the point was not pleaded is immaterial. The matter is a detail of accounting. As to the difficulty of ascertaining just what was the indebtedness over collateral, it may be great; but the legal error below was in refusing to consider the matter at all (*Record, fols. 1468-1488*)."

The majority opinion overruled the defense of laches upon the theory that the activity of the minority stockholders in the litigations heretofore mentioned was not acquiescence (although these litigations were conducted upon a theory completely opposed to that upon which the present recovery is based) and that no equities have intervened (*Record, fol. 1478*).

This conclusion completely loses sight of the fact that the relief sought in all the prior actions was entirely different from that given herein and founded upon an absolutely conflicting theory; and also of the fact that by reason of failure of the minority stockholders to demand physical delivery of the stock in any of such actions the Southern Pacific Company, relying upon its undisputed possession of such stock for over twenty years, in 1911—two years before the commencement of this action—pledged the same as security for the French Loan, and that it could only obtain this stock by pledging additional collateral under that Loan, to the value of about \$5,000,000.

In regard to this defense of laches, Judge HOUGH, after pointing out that Federal Courts of Equity are not bound by the State Statutes of Limitations; stated as follows:

“But in principle this court has adhered firmly to the doctrine that its equity jurisdiction is not subject to limitations of time or other matters created by State laws (*Kirby v. Lake Shore, &c., R. R.*, 120 U. S., at 138, and see *Hubbard v. Manhattan Trust Co.*, 87 F. R. 51). Yet where the jurisdiction is concurrent as between law and equity, the Chancellor is bound to apply the Statute (*Hall v. Law*, 102 U. S., at p. 466). In other cases (he) acts only by analogy, and not in obedience to the statutes.

"It follows that the present decision holds in substance that there is no remedy at law for these plaintiffs, that equity is the only jurisdiction for them, and that twenty-five years of failure to discover an always existing cause of action, based on facts of almost public notoriety—does not constitute laches, in the absence of silence, inaction or acquiescence by plaintiffs; or loss of advantages or change of situation caused or contributed to by plaintiffs—on defendant's part.

"In this holding I concur, extreme as the facts are—on the assumption that the case is not one of concurrent jurisdiction. I make that assumption only because the parties have assumed it."

Motion was made to the Circuit Court of Appeals for a rehearing, principally for the purpose of preserving to the Southern Pacific Company the right to have its day in court upon hardship to it of compelling it to physically deliver the stock in compliance with the provisions of the decree, without commensurate advantage to the minority stockholders, which right had been preserved to it by the order of the District Court. Such motion was denied without opinion (*Record, fols. 1497-1568*). Upon petition of the Southern Pacific Company, this Court granted *certiorari* and the case comes here for hearing upon the record filed in response to the writ.

Original petitions praying leave to intervene were filed in this court on behalf of Corn Exchange Bank, Francis P. Reilly, Henry J. Chase, Fergus Reid and Albert M. Polack, claiming to be stockholders of the Houston & Texas Central Railway Company situated similarly to complainants. Answers to said petitions were filed in which it was

shown that petitioners were not situated similarly to complainants. This court on submission of said petitions ruled that disposition thereof should await the hearing of the case.

Assignments of Error Relied On.

The assignments of error (*Record, fols. 1369-1413*) may be classified as follows:

The first to twelfth, inclusive, except to the denying of the motions for the dismissal of the bill of complaint and for judgment on the several separate defenses other than the seventh and the entry of the several orders denying said motions.

The thirteenth excepts to the entry of the interlocutory decree.

The fourteenth excepts to the overruling of the exceptions to the special master's report and to the confirmation of the same.

The fifteenth to the eighteenth, inclusive, except to the granting of the motions made on behalf of certain stockholders for leave to intervene and the orders entered granting such leave.

The nineteenth and twentieth except to the refusal of the court to enlarge the scope of the matters referred to the special master and the order entered thereon.

The twenty-first, twenty-second, twenty-third, fortieth and forty-seventh except to the final decree of October 5, 1916, as a whole.

The twenty-third and twenty-fourth except to the refusal of the court to relieve the defendant from making physical delivery of the shares of stock and the order entered thereon.

The twenty-fifth to thirtieth, inclusive, and forty-first to forty-sixth, inclusive, except to provisions

of the decree which hold that the Southern Pacific Company acquired the shares of stock of the railroad company in a trust capacity or other than as its own absolute property, and that it holds certain shares of said stock for the benefit of the complainants and the other stockholders who were permitted to intervene, in the proportions as in said decree specified, and requiring the Southern Pacific Company to account for dividends received upon said stock with interest thereon at the rate of six per cent. per annum.

The thirty-first excepts to the provisions of the decree which fixes the amount expended by the Southern Pacific Company at not more than \$2,602,615.77 in acquiring and obtaining possession of said shares of stock and fixes the *pro rata* amount to be paid by the complainants and other stockholders at \$26.026 a share.

The thirty-fourth, thirty-fifth, thirty-eighth and thirty-ninth except to the provisions of the decree which hold that the Southern Pacific Company in acquiring said shares of stock acted as a majority stockholder, and except to said decree in not providing that in acquiring said stock the Southern Pacific Company was acting as an underwriter or banker and in a capacity entirely separate and distinct from that of owner of the stock of the railway company.

FIRST POINT.

THE EFFECT OF THE DECREE APPEALED FROM IS (1) TO RESTORE TO THE STOCKHOLDERS OF THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY THE SAME OWNERSHIP IN THE PROPERTY AND ASSETS OF THAT COMPANY WHICH THEY HAD PRIOR TO THE FORECLOSURE DECREE OF MAY 4, 1888, IMPROVED AND INCREASED BY THE EXTINGUISHMENT WITHOUT PAYMENT OF THE FLOATING DEBT OF THAT COMPANY, AND (2) TO CARRY OUT THE REORGANIZATION UNDER THE PLAN AND AGREEMENT DATED DECEMBER 20, 1887, BY PRESERVING THE RIGHTS OF BOTH THE BONDHOLDERS AND STOCKHOLDERS OF SAID COMPANY BUT EXTINGUISHING WITHOUT PAYMENT THE CLAIMS OF THE GENERAL CREDITORS.

This point, though raised in both the District Court and the Circuit Court of Appeals, was not discussed or even alluded to in any of the opinions filed. It goes to the entire theory of the transaction and by its decision the legality of the reorganization is determined. The position of the court below that the Southern Pacific acquired the stock of the new company as majority stockholder, and therefore was a trustee for the minority, produces the result, upon the final carrying out of the reorganization plan and of the decree herein, of restoring the railway to the bondholders and stockholders without payment to the general creditors. Can this be the proper construction of an agreement which all courts have held to be fair and legal, particularly when such a holding is not necessitated by the facts?

The plan and agreement for the reorganization of the Railway Company is dated December 20,

1887. The parties to it are the bondholders under the various mortgages of the Railway Company, the Southern Pacific Company which is recited therein as interested in connecting roads in conjunction with which it desired the Railway to be operated and which guaranteed certain of the bonds provided for in the plan, and the Central Trust Company, the reorganization manager.

Stockholders of the Railway Company were permitted to secure an interest in the stock of the new company upon certain conditions. In addition to the bonded indebtedness there were two classes of claims prior to the interests of the stockholders (1) the reorganization expenses, and (2) the floating debt.

The stockholders were given the first right to take their *pro rata* share of the stock of the new company on paying their proportion of the prior charges above stated.

If the stockholders did not avail themselves of the privilege afforded them the floating debt creditors were given the right to take the stock of the new company upon payment of the first class of claims. In other words, the stockholders were given the right to take new stock on payment of the claims ahead of their stock, and the floating debt creditors were given the right to take the stock not taken by the stockholders on payment of the claims ahead of their debts.

The stockholders could not retain their interest in the mortgaged property without payment of the claims including floating debt. Equitably the property to be sold under the foreclosure decree could not be restored to the stockholders unless such creditors were paid and the plan so provided. The creditors' rights were therefore protected.

If both stockholders and creditors failed to avail themselves of the privilege afforded the Southern Pacific Company was given the right to acquire the stock upon furnishing the necessary money to carry out the reorganization.

It is stipulated the complainants failed to exercise the rights given them by the plan and did not pay the assessment which they were required to pay in order to obtain their *pro rata* shares of the stock of the Houston & Texas Central Railroad Company (*Record, fol. 699*).

The decree appealed from, however, directs the physical delivery to the complainants of the precise number of shares of stock they would have received under the plan of reorganization upon the payment by them of the assessment fixed thereunder. The decree requires a payment by the complainants of a lesser amount than such assessment, which was their *pro rata* of the claims having priority to their stock. The amount so to be paid under the provisions of the decree herein does not include any sum to be applied towards the floating debt.

The decree of foreclosure and sale extinguished and cut off the rights of all bondholders, stockholders and floating debt creditors in the property of the Railway Company. The purchaser under the decree of foreclosure and sale took the property free and clear from all liens and claims. Rights in this property could again be secured under the plan of reorganization by the bondholders, stockholders and floating debt creditors only upon complying with the conditions imposed. Only the bondholders complied.

The decree appealed from relieves the stockholders from complying with the conditions of the

plan of reorganization, but restores to them the same interest in the property foreclosed as they had prior to the foreclosure with the floating debt extinguished without payment. It produces a result entirely different from what the plan of reorganization contemplated and sought to accomplish. *What the plan contemplated, was that the property should not be restored to the bondholders and stockholders unless the floating debt creditors were paid.* Such a result was entirely equitable, legal and proper. What the decree produces is a restoration of the property to the bondholders and stockholders without any provision being made for the protection of the floating debt creditors and without such creditors being paid.

Had the plan contained provisions bringing about such a result a creditor thus disregarded would have had the right to proceed against the property sold under the decree entered pursuant to such plan.

Kansas City Southern Ry. vs. Guardian Trust Co., 240 U. S. 166.

Northern Pacific Ry. vs. Boyd, 228 U. S. 482.

Louisville Trust Co. vs. Louisville, &c., Ry. Co., 174 U. S. 674.

Western Union Tel. Co. vs. U. S. & Mex. T. Co., 221 Fed. Rep. 545.

In the *Kansas City Railway Co.* case it was held that a reorganization scheme adopted upon the foreclosure of a mortgage of a railroad company and a purchase thereunder which provides substantially for the stockholders of the company, but which makes inadequate provision for its unsecured creditors, cannot be sustained.

In the *Boyd* case, Mr. Justice LAMAR in the opinion of the Court stated:

"Corporations, insolvent or financially embarrassed, often find it necessary to scale their debts and readjust stock issues with an agreement to conduct the same business with the same property under a reorganization. This may be done in pursuance of a private contract between bondholders and stockholders. And though the corporate property is thereby transferred to a new company, having the same shareholders, the transaction would be binding between the parties. But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of a non-assenting creditor. As against him the sale is void in equity, regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company. Cf. *San Francisco & N. P. R. R. v. Bee*, 48 California, 398; *Greenell v. Detroit Gas Co.*, 112 Michigan, 70. There is no difference in principle if the contract of reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree. * * *

For, if purposely or unintentionally a single creditor was not paid, or provided for in the reorganization, he could assert his superior rights against the subordinate interests of the old stockholders in the property transferred to the new company. They were in the position of insolvent debtors who could not reserve an interest as against creditors. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with

the payment of corporate liabilities. Any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor was invalid. Being bound for the debts, the purchase of their property, by their new company, for their benefit, put the stockholders in the position of a mortgagor buying at his own sale. If they did so in good faith and in ignorance of Boyd's claim, they were none the less bound to recognize his superior right in the property, when years later his contingent claim was liquidated and established. That such a sale would be void, even in the absence of fraud in the decree, appears from the reasoning in *Louisville Trust Co. v. Louisville Ry.*, 174 U. S. 674, 683, 684, where 'assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder)' the court said that 'no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. * * * Any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation.' "

The court below, by its decree, produces the precise result which the same court would have been called upon to condemn had the plan of reorganization provided for the restoration of the property of the Railway Company to its bondholders and stockholders without making provision for the protection of the creditors and the payment of their claims.

SECOND POINT.

THE SOUTHERN PACIFIC COMPANY TOOK THE STOCK OF THE NEW RAILROAD COMPANY AS UNDERWRITER OR BANKER UNDER THE REORGANIZATION PLAN, AND NOT BY REASON OF THE FACT THAT IT WAS THE MAJORITY STOCKHOLDER OF THE MORGAN COMPANY WHICH HELD THE MAJORITY OF THE STOCK OF THE OLD RAILWAY COMPANY.

During the two years immediately following the appointment of receivers for the old Railway Company, every man's hand was against the other and each interest proceeded in utter disregard of the rights of the others. It was finally recognized that if any progress was to be made this war—as it might be called—must cease and some harmonious adjustment must be made by the parties in interest. This conclusion resulted in a series of conferences which produced the reorganization plan. At such conferences were representatives of the various issues of bonds, of the creditors and of the old Railway Company. Under the reorganization plan it was agreed that a new company should be formed, which should issue certain bonds and stock. By the plan the bondholders materially reduced the rates of interest on their respective bonds, waived payment of a portion of their defaulted coupons and for the balance took debenture bonds subsequent in lien to the three mortgages to be issued under the plan, but guaranteed by the Southern Pacific Company. This exhausted the possible bond issues and left the \$10,000,000 of stock as the remaining asset with which the cash necessary to carry through the plan could be procured.

Naturally the first thought was that the stockholders would wish to preserve their investment, but it was recognized even at that early date that stockholders could not be given a share in the reorganization of a bankrupt property unless creditors were provided for, and there was some \$3,000,000 of floating debt; so the plan provided that the stockholders might take their *pro rata* of the new stock on payment of their *pro rata* of the cash requirements of the plan and of the creditors' claims.

Recognizing that as the amount of stock outstanding, \$7,726,000, was relatively small in comparison with the floating debt of \$3,000,000 and the bond issues of \$18,000,000 and that the interest on all mortgages had long been in default, it was at once appreciated that the *pro rata* payment required would be large and that it was therefore possible that the needed cash would not be provided by the stockholders. The question then was, what next? The creditors were next in order, but they were the holders of the floating debt, so did not have to provide for its payment; hence it was provided that so far as the stockholders failed to take advantage of the rights given them, the creditors might obtain their *pro rata* of the new stock on payment of the charges in front of them, that is, the reorganization expenses.

Recognizing that even these offers might fail to produce the needed cash and that such cash must be assured or the plan could not be carried out—in other words, the plan had to be underwritten—then the inquiry was, could any one be found who would furnish the cash needed in case the stockholders and creditors declined? Naturally, the first underwriter thought of was the Southern Pacific Company, which was sufficiently interested

in having the properties operated in harmony with others it controlled to be willing to guarantee the bonds provided for in the plan; and so before authorizing a public offering of the stock to raise this cash (to-day a syndicate would have been formed for the purpose, but it must be remembered that this transaction took place over thirty years ago) it was provided that such stock of the new company as had not been taken by the stockholders and creditors should be offered to the Southern Pacific Company on payment by it of the reorganization expenses, that is, upon payment of the cash charges necessary to put through the plan. In other words, the Southern Pacific Company was given the first opportunity to underwrite the plan, not because it was the majority holder of the stock of the Morgan Company which in turn held the majority of the stock of the Railway Company, that is to say (as was held below) because it was majority stockholder, but because if the plan was to be put through somebody had to furnish the needed cash by purchase of the stock of the new company, and owing to its interest in adjacent properties, the Southern Pacific Company seemed to be the logical purchaser.

The plan next provided that if the Southern Pacific Company did not buy it the stock was to be offered for sale generally on precisely the same terms that it was offered to the Southern Pacific Company, so that while it is not true, as complainants say, that the stock was offered to the Southern Pacific Company, the majority stockholder, on better terms than to stockholders, it is true that *all stock not taken by stockholders or creditors* was first offered to the Southern Pacific Company, the underwriter (not the majority stockholder),

on exactly the same terms that the plan provided it should be offered to any third party who would purchase the same. The terms of purchase to the Southern Pacific Company being identical to those to any other prospective purchaser, it is clear that the offer of such stock to the Southern Pacific was to an underwriter or banker.

That every effort was made to secure the best possible treatment of the stockholders in the reorganization appears from the testimony of Mr. Tweed (counsel for the Huntington interests) who testified in one of the Gernsheim cases as follows:

"In all these negotiations I sought to and believe I did act to the best of my ability in the interests of the Railway Company and its stockholders with a view to securing a reorganization of the affairs of the company on such a basis that it would be the least burdensome and most advantageous to the interests of the stockholders of the old company. More than one-half of the stock of the old company was owned by Morgan's Louisiana & Texas Railroad & Steamship Company, and as far as lay in my power I endeavored to and did secure the most favorable terms that could be secured from the bondholders for the stock interests of the old company. I endeavored as far as possible to reduce the interests on the new securities which were to be issued in substitution for the old ones, and as far as possible to fund into new bonds the accrued and unpaid interest on old bonds then outstanding. I believed and still believe that in so doing I was acting for the best interests of all stockholders of the old company." (*Gernsheim v. Central Trust Company, Exhibit D, p. 224.*)

As was anticipated the relatively large amount of bonded debt and floating indebtedness and small amount of outstanding stock made the sum to be

paid per share by the stockholders on purchase of the new stock a relatively large one, over \$70 per share, and in consequence neither the Morgan Company nor any minority stockholder nor any floating debt creditor availed himself of the provisions of the plan. The stock was then offered pursuant to the plan to Southern Pacific Company, not as majority stockholder, but as an underwriter or banker who could furnish the needed cash to put through the reorganization and on precisely the same terms which, had the Southern Pacific Company declined to make the purchase, it would have been offered to any other prospective purchaser.

THIRD POINT.

NO ACT WAS DONE, NOR WAS ANY NECESSARY, BY THE RAILWAY COMPANY, BY THE MORGAN COMPANY ITS MAJORITY STOCKHOLDER, NOR BY THE SOUTHERN PACIFIC COMPANY ITS MAJORITY STOCKHOLDER, TO PERMIT THE ENTRY OF THE FORECLOSURE DECREE.

The claim of complainants below was that the foreclosure decree of May 4, 1888, could not have been procured except by the active assistance of the Southern Pacific Company, in effect the majority stockholder of the Railway Company, and as the entry of that decree was a condition precedent to the carrying out of the reorganization agreement, therefore anything which it obtained through the reorganization was obtained as majority stockholder of the Railway Company and consequently as trustee for the minority.

The principal point urged was that the withdrawal by direction of the Southern Pacific Com-

pany of defenses to the pending foreclosure suits permitted the entry of said decree. The provisions of the reorganization agreement that existing mortgages were to be foreclosed is pointed out as an evidence of such intention. We demonstrate later in this point that the foreclosure suits had reached such a stage that they could no longer be successfully defended, and it was in recognition of this fact that the provision referred to was included in the reorganization agreement. We further show that there was no necessity of withdrawing any defense (valid or futile) to entitle the trustees to foreclosure and sale. As a matter of fact no defenses were withdrawn.

The record in the Carey case, Exhibit B, contains a transcript of the clerk's docket in the foreclosure case upon which would appear the withdrawal of any defenses. The docket fails to show that any such withdrawals were had. The same record contains the testimony of Mr. Turner and Mr. Davenport, both of whom were present at the time the decree of foreclosure and sale was made, and all testified and agreed that no defenses were withdrawn. All the defenses were before the court and were necessarily passed upon by it before the entry of the decree.

That the court was not deceived, and had no doubt in respect to the situation and was fully aware of the existence of these defenses, is apparent from the opinion of Judge PARDEE in the Carey case. Judge PARDEE himself presided on the hearing preliminary to the entry of the foreclosure decree of May 4, 1888, and himself signed and directed entry of that decree, and in his opinion in the Carey case (being an attack by this same stockholders' committee) he states that the answers of

the Railway Company were not withdrawn, that the decree was properly and regularly entered without fraud and collusion on behalf of the Southern Pacific Company or anyone else (*Carey v. H. T. C. Railway Co.*, 52 Fed. Rep., p. 671).

Complainants have failed to make proof of any act on the part of the Southern Pacific Company, or by any of its allied companies, in any way aiding in the entry of the decree of foreclosure and sale and have failed to make proof of the allegations of the bill to the effect that the decree was obtained by fraud. In fact it appears affirmatively that the decree was entered after a hearing had at which all parties in interest were present, the testimony considered and all matters submitted and passed upon by the court.

Below complainants pointed to certain alleged facts the existence of which they claimed prevented the rendering of the decree of foreclosure and sale of May 4, 1888, without the aid of the Southern Pacific Company:

(1) It is not the fact, as claimed, that none of the mortgages in respect to which foreclosure bills were filed in 1886 covered all the property, so that, in order to obtain a sale of the entire property of the Railway Company, the bills filed in May, 1888, were essential.

It will be recalled that early in 1886 bills to foreclose the following mortgages were filed, (1) the Main Line First Mortgage covering the Main Line and ten sections of land for each mile of road (*MacArdell Record*, fols. 3390, 3391), (2) the Western Division First Mortgage covering the Western Division and ten sections of land for each mile of road (*MacArdell Record*, fols. 3415, 3416), and (3) the General Mortgage covering all the lines of rail-

way and all of its franchises and profits, also sixteen sections of land for each mile of completed road (*MacArdell Record*, fol. 3507).

From the above it is apparent that a decree of sale under these bills would have covered all the property of the Railway Company.

(2) *It is not true, as claimed, that there could be no foreclosure until default in principal, and then the land had to be sold first.*

It is true that the mortgages contained provisions requiring, in case of default in interest, that the trustees enter and operate, and a sale by the trustees was only authorized upon default in principal. It is well settled that the absence of express authority in the mortgage to bring an action for foreclosure in case of default does not prevent the maintenance of such action on default.

Pennsylvania Co. for Ins. etc. vs. Philadelphia & R. R. Co., 69 Fed. Rep. 482.

Guaranty Trust, &c., Co. vs. Green Cove Springs & M. RR. Co., 139 U. S. 137.

See, also,

Cook on Corporations, 7th Edition, p. 3106, § 836.

It is further well settled that the provisions of a mortgage in respect to a sale by the trustee are not binding upon the Court, and in any decree of sale such provisions may be ignored and the Court is at liberty to decree a sale of the property on such notice, in such order and under such conditions as equity requires.

Low vs. Blackford, 87 Fed. Rep. 392.

Guaranty Trust, &c., Co. vs. Green Cove Springs & M. RR. Co., 139 U. S. 137.

Farmers Loan & Trust Co. vs. Green Bay & Minn. R. Co., 6 Fed. Rep. 100.

Toler vs. East Tennessee V. & G. Ry. Co., 67 Fed. Rep. 168.

Guardian Trust Co. vs. White Cliffe Portland Cement & C. Co., 109 Fed. Rep. 523.

It follows, therefore, that the presence in the mortgages of special requirements regarding the order in which sales of the mortgaged property should be made by the trustees upon default in said mortgages and the absence of direct authority to bring foreclosure actions in case of default in the payment of interest, did not in any way prevent the entry of a decree of foreclosure and sale, and the inclusion therein of directions to sell the mortgaged premises as to the Court may seem proper.

(3) *It is not true, as claimed, that the Railway company's answer to the foreclosure suits to the effect that no decree could be entered except upon default in the payment of principal was conclusive and the foreclosure suits were at a standstill.*

We have shown above that, as a matter of law, the suits could be maintained, regardless of the special provisions of the mortgage relied on in the answers of the Railway Company to defeat the same. Two years and a half intervened between the filing of the bills and the entry of the decree, but during that time the complainants therein, the mortgage trustees, had been busily engaged in taking testimony in the face of every possible obstruction that could be devised, both by the creditors and the mortgagor company, so that the complainants therein had been greatly delayed in, but not prevented from, obtaining relief. An instance

of this appears from the testimony of Mr. Turner (counsel for The Farmers Loan & Trust Company, trustee under the General Mortgage), given in the *Carey* case, where he called attention to the fact that the equity of the Railway Company in certain of the land subject to the existing mortgages had been conveyed to the Lone Star Company; that this fact was unknown to complainants in the foreclosure bills until some time after the same had been filed, and it therefore became necessary to bring in the Lone Star Company as a party defendant in order to perfect title to the land in question. The foreclosure suits were thus delayed one or two terms (*Carey Record*, fols. 1243, 1244). Mr. Turner further testified that he was not in close touch with the proposed reorganization agreement and that he saw the same for the first time after it had been completed. He further states that he was proceeding with the foreclosure bills filed on behalf of Farmers Loan and Trust Company independent from and regardless of the reorganization agreement, and that he was prepared to ask for a decree in the spring of 1888. His testimony in that regard is as follows:

"Q. And did you, in the latter part of 1887, consider yourself in the position in which you would be able to force the companies to a final hearing and get a decree on the General Mortgage foreclosure bill in the Spring Term of 1888?

"A. I did."

(*Carey Record*, fol. 1245.)

It is therefore evident that, even if the reorganization agreement had not been made, the entry of a decree of foreclosure and sale could not have been avoided.

(4) *It is not the fact, as claimed, that the reorganization agreement provided that defenses were to be withdrawn.*

The parties to the reorganization agreement were the holders of the bonds secured by the various mortgages, the Southern Pacific Company recited as interested in connecting roads in conjunction with which it desired the Railway to be operated and agreeing to guarantee certain of the new bonds to be issued under the plan, and Central Trust Company of New York, the reorganization manager.

The agreement provided that all existing mortgages were to be foreclosed, as could legally be done in spite of the opposition of the Railway Company, the mortgagor, as at the time that instrument was drafted all mortgages were in default. The agreement was not, as insisted on below, that defenses were to be withdrawn. This claim is unfounded and it is most important that this distinction be kept in mind. Such an act would have required the active aid of the Railway Company. The agreement that existing mortgages were to be foreclosed in no way aided the complainants to obtain a decree of sale in pending foreclosure suits for *all* of the property of the Railway Company, nor was any action needed by the Southern Pacific Company or its allied interests to accomplish this result. The filing in May, 1888, of the foreclosure bills upon the Main Line and Western Consolidated and the Income and Indemnity Mortgages, to foreclose which no bill had previously been filed, was probably due to the adoption of the reorganization agreement. The filing of these bills only assisted in eliminating possible future contentions as to the rights of the holders of bonds under these junior mortgages not

previously under foreclosure and in perfecting the titles to the property sold. The Southern Pacific Company, in joining the agreement containing this provision, simply acquiesced gracefully in what could not be prevented.

(5) It is not the fact, as claimed, that defenses were withdrawn. The decree of foreclosure and sale was regularly entered upon the pleadings and testimony theretofore taken out of court in support of the bills pending for over two years.

The reorganization agreement provided that "all existing mortgages are to be foreclosed," not that the defenses interposed in the various suits were to be abandoned. The record shows that the foreclosure of the mortgages was accomplished without withdrawing any defenses. The result was brought about by the presentation, upon proper evidence, in the orderly course of the foreclosure of an application for a decree of foreclosure and sale.

Every possible effort was made below and will undoubtedly be made in this court to create the impression that the entry of the decree was a collusive proceeding, and to involve the same in an atmosphere of doubt as to its regularity. It was claimed below :

(a) That the proposed decree was drafted prior to the departure of the parties in interest for the hearing in Texas by the same parties who drew the reorganization agreement, and was agreed to some time prior to its entry.

In the Carey case, Mr. Turner, counsel for the trustee of the General Mortgage, testified that he drafted the decree and that he had had nothing whatever to do with the reorganization agreement, and believed that he had never seen it until after

it was printed, and that he did not have its provisions in mind when he drafted the decree (*Carey Record*, fols. 1213, 1214). Copies of the decree were sent to all counsel interested, including Baker, Botts & Baker, counsel for the Railway Company, for the purpose of having them examine it in advance, and thus shortening the stay of the parties in Texas. The decree entered was in the main in the form as prepared by Mr. Tweed, though there were important changes and additions made after reaching Texas (*Carey Record*, fol. 1215). Thus it appears that the decree, as shown by undisputed evidence, was the production of counsel for one of the trustees, who had nothing whatever to do with the reorganization, who was not a party to the reorganization agreement and had no agreement with the Southern Pacific Company relative to the foreclosure of the mortgages and that it was drafted completely independently of that agreement.

(b) That the Railway Company was not represented in court on the entry of the foreclosure decree except by Mr. Farrar, who was counsel for the Southern Pacific Company, Morgan's Company and the Southern Development Company.

The portion of Mr. Turner's testimony quoted below absolutely refutes this contention. In discussing the parties present and taking part in the final settlement of the decree, Mr. Turner testified as follows:

"Q. You say you are not sure that Judge Baker was not present?

"A. Somebody was there from his firm; if he wasn't there it must have been Mr. Botts, and I am not certain but they were both of them there, although I can't tell you positively."

(*Carey Record*, fol. 1220.)

(c) That the decree and sale had thereunder was "a snap foreclosure" of which there is no proof that the stockholders had any knowledge.

In the Carey Record we find the testimony of James Rascover, who had charge of the advertising of the reorganization plan, and to his testimony is annexed copies of the bills to the Central Trust Company for advertising the reorganization plan, from which it appears that the plan was advertised in the *Tribune, Sun, Herald, World, Post, Mail and Express, Journal of Commerce*, and numerous other papers, the first of such advertisements appearing as early as January 4, 1888, four months prior to the entry of the decree and eight months prior to the sale. The testimony of Mr. Rascover will be found in the Carey Record, pages 1012 to 1019, and the exhibits showing the advertisements and papers in which same appeared will be found at pages 1053 to 1062. From the above evidence it is perfectly clear that every possible effort was made to give publicity to the terms of the reorganization plan and the attempt to characterize the entry of this decree and the sale had thereunder as a "snap foreclosure" is absolutely unwarranted.

Further showing that the complainants' testator had full and prompt knowledge of the reorganization agreement long before the foreclosure sale and practically at about the time the agreement bore date, to wit: December 20, 1887, we would call attention to the following extract from the complaint:

"As soon as the terms of said reorganization agreement were announced and published, Michael Gernsheim, Cornelius MacArdell, Walter B. Lawrence, plaintiffs' testator, and other stockholders of the Railway Company, protested against the terms of said agreement,

claiming that it practically gave the Railway Company to the Southern Pacific Company in fraud of the individual stockholders" (*Record, Complaint, fol. 59. Italics ours*).

This clearly shows that the designation of the proceeding as "a snap foreclosure" is done simply in the hope of prejudicing and misleading the court.

FOURTH POINT.

EVEN IF THE SOUTHERN PACIFIC COMPANY BE HELD TO BE THE MAJORITY STOCKHOLDER OF THE OLD RAILWAY COMPANY, STILL THE CONDITIONS UNDER WHICH IT PURCHASED THE STOCK ARE SUCH THAT IT CANNOT UNDER THE AUTHORITIES BE HELD TO BE A TRUSTEE FOR THE MINORITY.

The proofs show no act of mismanagement or fraud, or even of control by the Southern Pacific Company. The mere fact that the majority stockholder purchases the property is not sufficient to hold it as a trustee for the minority.

The language of Judge WANTY, writing for the Circuit Court of Appeals for the Sixth Circuit in the case of *Rothchild vs. Memphis & C. R. Company*, 113 Fed. Rep. 476, is pertinent:

"The sale of the property was not brought about through its (majority stockholder) manipulation, and does not show that the property did not bring a fair price. If the minority stockholders desired to become purchasers, they could have devised a plan of reorganization, and bid in the property if it did not bring them what they thought was its full value at the sale. *Oil Co. v. Marbury*, 91 U. S. 587, L.

Ed. 328. This the complainant did not do but waited until after the sale had been made and confirmed and the purchaser had been in possession of and operating the property since February 26, 1898, until August 7, 1899, when he filed this bill; the allegations of which would, if action had been promptly taken, have brought the defendant Southern Railway Company within the principles laid down in the cases holding a majority stockholder a Trustee in the purchase of the corporate property for the benefit of all of the stockholders of the corporation. But the proofs lack the essential elements of control and mismanagement without which the relief could not have been given even if the bill had been seasonably filed. The allegations of control, mismanagement and fraud are emphasized throughout the bill of complaint but seem to be wholly lacking in the proof, *the complainant apparently relying upon the position that, when it is shown that a person holding a majority of the stock of a corporation purchases all of its property, there is a presumption of fraud which makes him a Trustee for all of the stockholders, and proof of fraud becomes unnecessary.* No case in the large number cited by counsel for the complainant justifies this position. In each one there had been actual fraud in the control and mismanagement of the property for the purpose of bringing about its acquisition by the majority stockholder. It is true that every transaction of a majority stockholder with a corporation will be viewed by the courts with jealousy and set aside on slight grounds; but it is not void, and, if the relations of the majority stockholder are fair and open, there is no rule which forbids his dealing with the corporation and no presumption that such dealing is fraudulent." (Italics ours.)

The position of the Southern Pacific Company is analogous to that of the Omaha Company referred

to by Mr. Justice BREWER in the opinion of the Supreme Court of the United States delivered by him in the case of *Farmers Loan & Trust Company vs. Chicago, &c., Railway Co.*, 163 U. S. 31.

In that case the plaintiff sued as trustee in a deed of trust executed by the Chicago, Portage and Superior Railway Company (thereafter called Portage Company) to secure an issue of bonds. The deed of trust covered all the property of the Portage Company, including a certain grant of lands made by the United States to the State of Wisconsin and transferred by the State to it. Plaintiff claimed that the Chicago, St. Paul, Minneapolis and Omaha Railway Company (thereafter called Omaha Company) wrongfully and fraudulently prevented the Portage Company from complying with the conditions of the grant and caused it to be transferred to itself; that the Omaha Company, by its wrongful acts, became the sole stockholder of the Portage Company and used its powers to strip the Portage Company of its property and that the act of the State of Wisconsin revoking the grant to the Portage Company did not divest the creditors of the Portage Company of their rights, otherwise such act would be void as impairing the obligations of a contract. At pages 46-47 Mr. Justice BREWER states:

"Finally it is insisted that the Omaha Company wrongfully and fraudulently secured through the action of the State of Wisconsin a transfer of the land grant to itself, and further that the action of the legislature in making such transfer did not divest or attempt to divest the creditors of the Portage Company of their legal or equitable rights, nor prevent them from having the lands appropriated so far as they are necessary to the satisfaction of their debts.

"With reference to the first portion of this charge, it is sufficient to say that there is absolutely no foundation for it in the testimony. It does not appear that there was any corruption or attempted corruption by the Omaha Company of any of the members of the legislature or other officials. Everything it did was open and above board. At the instance of the officials of the Portage Company, it consented that a stipulation be introduced into the act of foreiture and transfer; that it should pay to the Governor of the State the sum of \$78,000 to be used in payment of labor claims for work done on the Portage Company line and after the passage of the act did pay the stipulated sum. We are left therefore to the single question whether the act of the legislature either in terms or by implication burdened the transfer with a continuing obligation for the debts of the Portage Company. No such burden was in terms imposed. The grant was, so far as the legislative action discloses, simply taken away from the Portage Company because of failure to comply with the conditions under which it had originally been bestowed upon it. On such failure of the Portage Company all its right to the lands ceased. Whatever the legislature might thereafter do in its behalf was a mere act of grace. No creditor of the Portage Company had any legal or equitable right to any portion of those lands, and if the legislature had simply revoked the grant and resumed possession on behalf of the State there could be no pretence of a claim that any such creditor could subject the lands or any interest therein to the satisfaction of his debt."

FIFTH POINT.

THE DOCTRINE THAT THE MAJORITY STOCKHOLDER MAY BE A TRUSTEE FOR THE MINORITY HAS NO APPLICATION UNDER THE EXISTING STATE OF FACTS.

While we do not dispute the proposition that under certain circumstances the majority stockholder is a trustee for the minority, we submit that in every case where such doctrine has been applied, the majority stockholder was found to be in control of the property, was found to have mismanaged it and was found guilty of some fraud or concealment or had performed some act which resulted in depriving the minority of its rights or had detrimentally affected them.

See *Rothchild vs. Memphis & C. R. Co.*, 113 Fed. Rep. 480. Mr. Justice WANTY there said:

"If he (majority stockholder) is not in control of the property and does not mismanage it to the prejudice of the minority stockholders, he may purchase, if there be no actual fraud, the property of the corporation at a judicial sale for his own benefit, and he is not accountable to any other stockholder for the property so purchased."

See *Rogers vs. Nashville C. & St. L. Ry. Co.*, 91 Fed. Rep. 312. Mr. Justice LURTON there said:

"That this majority of the stock has been used for the purpose of electing a board of directors selected by the majority owner is no cause of complaint."

In each of the cases cited in the opinion of the District Court (*Record*, fol. 849) in support of its conclusion that the Southern Pacific Company

acquired the property subject to all equitable rights which the minority stockholders might have therein, it will be found that the majority stockholder was in control of the affairs of the corporation, was guilty of fraud or concealment or managed the property so as to deprive the minority of its rights or injure its interests and procure for itself an advantage or profit.

No such proof has been made in the case at bar. All that was proven was an election of directors, apparently at the selection of the Southern Pacific Company. There is no proof that the majority stockholder did or attempted to do anything or procured the performance of any act by its allied companies, and there is no proof of any corporate action had by the majority stockholder. We do not understand that a claim that such a state of facts was proven has ever been or will now be made. No fraud was proven and we do not understand that such a claim is now made. All questions of fraud have been adjudicated against the minority stockholders in the prior litigations. No concealment is charged and none was proven. Counsel for the complainants sought below to establish some affirmative action amounting to mismanagement on the part of the appellant by claiming that a compromise was arrived at and defenses were withdrawn to the foreclosure bills. Their contention overlooks and disregards the following:

(a) The Southern Pacific Company was not the majority stockholder of the old Railway Company.

(b) There is no proof that the Southern Pacific Company or the majority stockholder of the old Railway Company exercised its powers in a way detrimental to the minority. In fact the proof is directly to the contrary.

(c) A decree of foreclosure and sale under which all of the property of the old Railway Company would have been sold could have been had, and was about to be had, even though the reorganization agreement had never been made.

(d) No defenses were withdrawn. Such fact was expressly decided by Judge PARDEE, the judge who presided at the time the decree was taken in the action brought by Carey on behalf of this very stockholders' committee in an endeavor to set aside the sale, and is *res adjudicata*.

(e) All of the rights of all stockholders, majority and minority, were legally cut off by the foreclosure decree, and there was nothing left for the majority to trade away or which it could acquire by the exercise of its powers as majority stockholder.

(f) All of the stockholders, majority and minority, were afforded equal rights and could have acquired an interest in the new Railroad Company by complying with the provisions of the reorganization agreement.

(g) The opportunity afforded to the Southern Pacific Company to obtain the stock of the new Railroad Company, provided the floating debt creditors and stockholders did not avail themselves of the provisions of the reorganization agreement, was granted to it as a stranger or underwriter of the plan, and not as a stockholder, and was based upon a valid consideration, viz., the guarantee of the bonds of the new Railroad Company, and this is exactly the right which would have been granted to any other stranger who agreed to furnish the cash and execute the guarantees required by the plan.

When *all* of the facts are taken into consideration it appears that counsel for the complainants

fail to establish the elements necessary to render the trust doctrine applicable.

It is to be borne in mind that the Southern Pacific Company owned a majority of the stock of the Morgan Company, which in turn owned 51 per cent. of the outstanding stock of the old Railway Company. It did not itself own a single share of the old Railway Company. We have been unable to find any authority which holds, under such a state of facts as appears in this record, the existence of a trust relation. None of the opinions below cite an authority to support the conclusion that such a relation exists and counsel for the complainants were unable to produce any.

A reading of the cases in which the doctrine that the majority stockholder occupies the position of trustee toward the minority is applied, shows that such doctrine is based upon the theory that all stockholders have an equal interest in the corporate property based upon the actual ownership of stock of the corporation, and that the affairs of the corporation should be administered with equal fairness to all so interested. We submit there is no warrant or reason for extending the doctrine to a person or corporation who is not the owner of said stock, but simply controls the same by reason of a part ownership of the owner thereof and has committed no wrong.

SIXTH POINT.

THE SEPARATE DEFENSES WERE FULLY ESTABLISHED AND ENTITLED THE SOUTHERN PACIFIC COMPANY TO A DECREE IN ITS FAVOR.

A.

The Houston & Texas Central Railway Company is an indispensable party, and, owing to its absence, the bill of complaint should have been dismissed.

Complainants, in one of their earlier briefs, in setting out the nature of their bill of complaint in the present action said:

"The complaint asserts that the majority stockholders by trading away rights belonging to the old corporation obtained for itself an individual advantage."

If the rights traded away "belonged to the old corporation", certainly such corporation should be a party, for if there is a recovery herein of what was obtained for these rights such recovery belongs to the old corporation and should be distributed by it among those entitled. Complainants' answer to this below was that, though by this trade the creditors and stockholders of the old company were deprived of their property, still the foreclosure decree entered pursuant to such trade cut off the creditors, therefore the value of the property thus wrongfully taken from the old company should not be returned to it, but we, the old stockholders, should be permitted to divide it. In other words, their claim is that a wrong has been done, but they do not want the profits which have been made by

reason of this wrong to be given back to the owner of the rights which were wrongfully taken. Their wish is to have this Court decree that the alleged wrongdoer divide the spoils thus obtained with them. This seems somewhat novel relief to ask of a court of equity.

In the opinion filed upon the hearing of the separate defenses (*Record, fols. 612-621*), the District Court took no notice of the very significant admission above quoted but intimated that, though the allegations of the complaint were similar to those set forth in the case of *Lawrence vs. Southern Pacific Co.*, 180 Fed. Rep. 822, with the exception that the alleged wrongful acts were now set forth as the positive acts of the Southern Pacific Company, and the complainants were basing their right to an accounting for acts causing damage upon allegations of injury to their own property by these alleged wrongful acts, and it would assume, for the purposes of that hearing, that it was intended to show a state of facts which would entitle complainants to recover in their individual right.

Examination of the bill of complaint will show that the prayer is identical with that in the Lawrence case when that case was finally dismissed (all relief prayed for in respect to the land having been eliminated by Mr. Olcott's death), and authorities hereinafter mentioned show that such a prayer does not make the action an individual one, even had the matter not been removed from the sphere of speculation by the admission above quoted. It conclusively appears that the Railway Company (the old company whose stock the complainants hold) had neither surplus nor assets, and complainants completely failed to prove individual rights to which they, as stockholders, had clear title (exclusive of their representative rights) and,

hence, as was held in the Lawrence opinion, the absence of the party who had legal title—that is the Railway Company—makes it impossible for a representative action to be maintained. With this analysis of the complaint, and the proofs upon the trial, we submit that the identity of the cause of action here set up cannot be distinguished from the cause of action in the old Lawrence case.

The following cases establish clearly that so long as the injury complained of is one which is common to all the stockholders of a corporation, the cause of action is vested in the corporation and an individual stockholder can only sue in equity in the right of the corporation and must join it as a party defendant.

DeNeufville vs. N. Y. & N. Ry. Co., 81 Fed. Rep. 10.

Redfield vs. B. & O. R. R. Co., 124 Fed. Rep. 929.

Ames vs. American Tel. & Tel. Co., 166 Fed. Rep. 820.

Hunnewell vs. N. Y. Central Railroad Co., 196 Fed. Rep. 543 (546).

Hyams vs. Old Dominion Co., 204 Fed. Rep. 681 (685).

Though the prayer be that the proceeds found due upon an accounting shall be distributed ratably among the complainants and other stockholders in proportion of the amount of stock held by them, this cannot change the nature of the action or confer upon the stockholders a right which is vested only in the corporation, and inasmuch as the corporation is an indispensable party the action cannot proceed without its presence.

Howe vs. N. Y., N. H. & H. RR. Co., 142 App. Div. 451.

Thompson vs. Stanley, 20 N. Y. Supp. 317.

Miller vs. Crown Perfumery Co., 125 App. Div. 881.

If the Railway Company was an indispensable party in the Lawrence case for the reasons stated in that opinion it is so in the present action. In that action this court, after explaining the cases of *Ervin vs. Oregon Railway & Navigation Co.*, *Kuchler vs. Greene, Slater Trust Co. vs. Randolph-Macon Coal Co.*, *Payne vs. Hook*, and others, said:

"It (the H. & T. C. Railway Company) is the real party in interest if the sales of its property were invalid, and *it is accused of the wrong doing by which its property was sold.*"

Lawrence vs. Southern Pacific Co., 180 Fed. Rep. 822 (826).

In the case at bar the Railway Company is accused of wrong doing as it is claimed that "valid defenses were withdrawn" in the foreclosure suit. Hence, under the foregoing decision, and many others hereinbefore referred to, it is absolutely entitled to be heard.

This is precisely the conclusion reached by Judge PLATT, and upon the same grounds, in *Redfield vs. Baltimore & Ohio Railway Co.*, 124 Fed. Rep. 929.

The complaint was apparently drafted upon the theory announced by the dissenting opinion in *MacArdell vs. Olcott et al.*, 189 N. Y. 368. This opinion was written in an action in which all parties interested were present, and contains the following:

"It is apparent that any claim the minority stockholders have in equity and by way of lien against the Southern Pacific Company *can only be worked out through the old company and in an action where all the parties in interest are represented as in this case.*" (*Italics ours.*)

It is significant that the opinion which has been used as a basis for the preset action states that the Railway Company is an indispensable party.

B.

Election and Estoppel.

The record shows the stockholders' committee was actively behind the prosecution of the Carey, MacArdell and Lawrence cases, and was cognizant of and in sympathy with both the Gernsheim cases, and knowledge of all proceedings had in those cases is brought home to Lawrence, complainants' testator.

All of the prior suits, which were brought on behalf of the minority stockholders, attacked the foreclosure decree and sales had thereunder and also the proceedings under the reorganization agreement, claiming that the same were part of a scheme to defraud the stockholders; in other words, they disaffirmed everything done therein and sought to have the original *status*, which existed prior to the entry of the decree of foreclosure and sale, restored.

In the suit at bar and in the suit brought by complainants' testator it is sought to affirm the sale had pursuant to the decree of foreclosure and sale and the carrying through of the reorganization agreement, and to share in the alleged benefits derived therefrom by the Southern Pacific Company, which carried out the terms of the reorganization agreement, without paying their *pro rata* of the price that the Southern Pacific Company paid.

When it is recalled that complainants' testator was fully aware of every step taken in the earlier actions, was in full sympathy with their objects, contributed in part to their cost and was a member of the Association of Stockholders which caused

such actions to be brought, then we submit that he is bound by the election of the plaintiffs in those suits to disaffirm the sale and to decline the benefits of the reorganization agreement, and complainants cannot now be heard after litigation for so many years to change the position taken by their testator and to claim the benefits of the reorganization.

The cases holding that where two inconsistent remedies are open to the plaintiff his pursuit of one of these remedies with full knowledge of the facts constitutes an election and prevents his thereafter pursuing the other are numerous and well known. It is perhaps unnecessary to cite authorities upon this proposition, but we would refer briefly to one or two cases. In the case of *Klipstein & Co. vs. Grant* the opinion of Judge NEWMAN, affirmed by the Circuit Court of Appeals, is illuminating. Judge NEWMAN said:

"I am satisfied that this bill must be dismissed, for the reason that complainants have already sought a remedy which is entirely inconsistent with the one they now seek. The suit which is shown by the pleadings to have been heretofore brought and prosecuted to a conclusion by Klipstein & Co. in the Circuit Court was upon the theory of a ratification of a sale by C. L. Allen to the Allen-Miles Company. The present proceeding is entirely inconsistent with the position taken in the former suit. The correct rule of law as I understand it on the subject is stated in 7 Encyc. Pl. & Pr., pp. 362, 363, 364. The election of a remedy is considered by the authorities to be complete when suit is brought; certainly it is complete when carried to a conclusion. In *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52, the rule is stated in the syllabus in this way: 'When a party has two

remedies, inconsistent with each other, any decisive act by him, done with knowledge of his rights and of the facts, determines his election of his remedy.' In the opinion, after quoting a number of authorities, the following occurs: 'The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies.' In this case of *Robb v. Vos* is a quotation from the opinion in *Thompson v. Howard*, 31 Mich. 309, 312, as follows: 'A man may not take contradictory positions; and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again.' The same doctrine is laid down in *Bacon & Company v. Moody*, 117 Ga. 207, 43 S. E. 482. For this reason the bill cannot be maintained."

Klipstein & Co. vs. Grant, 141 Fed. Rep. 72.

See also *In re Jacob Berry*, 174 Fed. Rep. 409.

Where notice printed in a copyright publication recited that a sale at a less price than one dollar per volume would be treated as an infringement of the copyright the publisher thereby elected to pursue that remedy for violation of the notice and was precluded from maintaining an action to enjoin the sale.

Bobbs-Merrill Co. vs. Strauss, 147 Fed. Rep. 15.

When on an insurance company's change of plan a dissatisfied policy holder elected in writing to cancel his certificate and demanded the return of the money he had paid, this was an election and he was not entitled thereafter to file a bill and compel the association to carry out its original plan.

Iversen vs. Minnesota Mutual Life Ins. Co., 137 Fed. Rep. 268.

The rule is the same in the courts of this state and in a leading case where plaintiff had a right to elect to enforce in equity a contract made for his benefit by the sale of the security pledged for the same or to bring an action at law to recover damages for breach of the contract, and had adopted the former, it was held that he was bound by the judgment in such suit and estopped from bringing a second action to recover damages for depreciation of the security.

Bracken vs. Atlantic Trust Co., 167 N. Y. 510.

C.

Laches and Notice.

It is conceded that Lawrence was fully informed in regard to the scope and progress of the prior actions. Judge PATTERSON in the Gernsheim case and Judge PARDEE in the Carey case both held that plaintiffs in those cases had unreasonably delayed in bringing their actions and Lawrence knew of these decisions. The MacArdell case was carried along on the calendar for ten years before it was tried and Lawrence knew of this fact also. *With all this information Lawrence waited until twenty years*

after the entry of the foreclosure decree before he took any step to enforce his alleged rights.

Though all the former actions were brought by the plaintiffs on behalf of themselves and all others similarly situated, yet until judgment therein plaintiffs were the sole parties in interest and were free to deal with such litigations as they saw fit. Hence it was the duty of any one having similar rights or any other rights in respect to the subject matter of such actions, to promptly seek to enforce the same either by intervention or the commencement of a separate action.

We have not only the general rule of law but specific notice in these litigations to Lawrence either to proceed promptly or to be bound by the fate of the actions then pending. Lawrence elected not to institute any action until all pending litigations had been decided in favor of the defendants, and therefore he is bound by the decisions in such actions.

The present suit by new parties and upon a new theory should be held to come too late to entitle the complainants to any relief in a court of equity. The laches alone are such as to require judgment for the defendant.

The statute of limitations has no direct application to a suit in equity, but when the delay has been equal to the time prescribed by such statute it has been repeatedly held that recovery would be denied upon the ground of laches, and this, too, even in the case of a foreign corporation against which in a common law action the statute would not avail. A recent decision on this point is that of Judge HOUGH in *Venner vs. Central Trust Co.*, affirmed by the Circuit Court of Appeals in 204 Fed. Rep. 779.

In the majority opinion the Circuit Court of Appeals stated that they did not think the circumstances sufficient to justify defeating the complainants on the ground of laches. They point out there had been no acquiescence on the part of the minority, but, on the contrary, vigorous protest. This opinion makes no reference to the fact that all such activities were on a theory completely at variance with the present action. The opinion next points out that mere passage of time is not always a determining feature, but that there must also be a change in the situation to the prejudice of the defendant, and erroneously concludes that this was not the fact in the present case because the exact nature of the claim was known to the defendant from the beginning and that there is no substantial dispute in fact.

The record shows that the claim in the case at bar is entirely different from that advanced in the earlier litigations, and that the present claim ratifying the reorganization and asking for the benefits derived therefrom was first advanced in the Lawrence case in 1908, and this was the earliest date that knowledge of any claim of this description came to the Southern Pacific Company. But, in addition, the prayer in the Lawrence case and here is simply that a trust be imposed upon the stock received by the Southern Pacific Company for the benefit of the minority and an accounting had. No suggestion of a delivery of a *pro rata* of the stock in kind. It was not until the trial of this action in 1915 that any such claim was advanced. The Southern Pacific Company received this stock in 1890, and it was not until 1915 (though active litigation had been going on for many years in regard to the situation) that the suggestion was made that

the minority stockholders were entitled to delivery of any part thereof. In other words, for twenty-five years the Southern Pacific Company had been in possession of the stock without the slightest claim being advanced by any one against such possession. It is small wonder, then, that in 1911 the Southern Pacific Company pledged this stock as part security for a loan to certain French bankers and covenanted that it was the lawful owner thereof. We show later (see Eighth Point, p. 86) that it would cost the Southern Pacific Company at least \$5,000,000 now to withdraw that stock from said loan, so that the majority was in error when it stated that the delay had not been prejudicial to the defendant.

The situation and effect of this holding in the majority opinion is tersely and effectively put in Judge HOUGH's opinion as follows:

"On the question of laches I venture to emphasize what seems to me the logical result of our decision.

The action at bar was begun over twenty-five years after it arose.

In the sense of inactivity or acquiescence there was no laches at all; but every effort was legally mis-directed until this suit began. It rests not on fraud, nor concealment; but on the assertion of a legal right, which is now enforced by declaring a constructive trust and decreeing an accounting. No statute of limitations was pleaded; this we have said is not necessary in equity (*Waller v. Texas, &c., Co.*, 229 F. R. at 92), meaning that the advantage of measuring by the Statute the plaintiff's negligence in pursuit does not rest on pleading. If the act is relied on as a bar, it must be pleaded (*Sullivan v. Portland, &c., Co.*, 94 U. S. 806). We have measured laches by analogy with the Statute (*Venner v. Central Trust*

Company, 204 F. R. 779) and done so (in admiralty) even when the party claiming the benefit was a foreign corporation in whose favor the Statute did not run (*Davis v. Smokeless Fuel Co.*, 196 F. R. 753).

But in principle this Court has adhered firmly to the doctrine that its equity jurisdiction is not subject to limitations of time or other matters created by State laws (*Kirby v. Lake Shore, etc. R. R.*, 120 U. S., at 138, and see *Hubbard v. Manhattan Trust Company*, 87 F. R. 51). Yet where the jurisdiction is concurrent as between law and equity, the Chancellor is bound to apply the Statute (*Hall v. Law*, 102 U. S., at p. 466), 'in other cases (he) acts only by analogy and not in obedience to the statutes.'

It follows that the present decision holds in substance that there is no remedy at law for these plaintiffs, that equity is the only jurisdiction for them, and that twenty-five years of failure to discover an always existing cause of action based on facts of almost public notoriety—does not constitute laches in the absence of silence, inaction or acquiescence by the plaintiffs; or loss of advantages or change of situation caused or contributed to by plaintiffs—on defendant's part.

In this holding I concur, extreme as the facts are—on the assumption that the case is not one of concurrent jurisdiction. I make that assumption only because the parties have assumed it."

It will be noted that Judge HOUGH also overlooked the change of situation occasioned by the pledge of the stock under the French Loan. He concurs in the denial of the defense of laches upon the assumption that the case is not one of concurrent jurisdiction between law and equity. It would seem from his opinion that had defendant

interposed the defense that there was an adequate remedy at law, and therefore the claim was barred by the Statute, in Judge HOUGH's opinion such a defense should have been sustained. It should be borne in mind that the prayer of the bill is for an accounting, which form of action certainly is cognizable in equity only.

It is submitted, though, that where complainants failed for twenty-five years to avail themselves "of an always existing cause of action based on facts of almost public notoriety", and where by reason of their failure to avail of such open remedy the other party was induced to act to its detriment under the decisions relief should be denied upon the ground of laches.

The situation in *Riker v. Alsop*, 155 U. S. 448, where the Court, entirely disregarding the merits of the case, dismissed the bill upon the ground of laches alone, seems singularly applicable to the present action. Mr. Justice HARLAN there states:

"But without placing our decision upon that ground and independently of the statute of limitations the case is one in which a court of equity should refuse to interpose because of laches upon the part of the appellant in asserting the rights of new claims. Looking at all the circumstances, particularly the nature of the property, good faith demanded that if he intended to question the right of the trustee to acquire, hold and transfer it for the exclusive benefit of certificate holders, he should have done so by former proceedings commenced within a reasonable time after he became cognizant of the facts. The case is one peculiarly for the application of the rule that equity, in the exercise of its inherent power to do justice between parties, will when justice demands it refuse relief even if the time elapsed without suit is less than that prescribed by the statute

of limitations. *Harwood v. Railroad Co.*, 17 Wall. 78; *Twin Lake Oil Co. v. Marbury*, 91 U. S. 587, 592; *Hayward v. National Bank*, 96 U. S. 611, 616; *Richards v. MacKall*, 143 U. S. 224, 250. As observed in *Halstead v. Grinnan*, 152 U. S. 412, 416, the length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case and is not like the matter of limitations subject to an arbitrary rule. It is an equitable defense controlled by equitable considerations, and the lapse of time must be so great and the relations of the defendant to the rights such that it would be inequitable to permit the plaintiff to now assert them.

"A court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society by refusing to interfere where there has been gross laches in prosecuting rights and where long acquiescence in the assertion of adverse rights has occurred, and in these respects each case must be governed by its own circumstances. A purchase by a trustee of trust property for his own behalf is not absolutely void but voidable, and it may be confirmed by the parties interested either directly or by long acquiescence *or by the absence of an election to avoid the conveyance within a reasonable time after the facts come to the knowledge of the cestui que trust.*" (Italics ours.)

Hammond vs. Hopkins, 143 U. S. 224.

Upon the general question of laches and failure to bring an action in support of claimant's right within a reasonable time, see

Speidel vs. Henrici, 120 U. S. 377;

Felix vs. Patrick, 145 U. S. 317;

Rothschild vs. Memphis, &c., Railroad Co.,
113 Fed. Rep. 476.

From the above authorities it seems clear that the delay in presenting complainants' claim in the case at bar has been such as to convict them of laches.

D.

Res Adjudicata.

In the amended complaint in the Carey action it was alleged among other things that the decree of foreclosure and sale was fraudulent and void; that the reorganization agreement was a fraud upon the stockholders and that the amount fixed by the Central Trust Company of New York as payable by the stockholders of the old Railway Company in order to entitle them to acquire stock in the new Railroad Company was wrongfully and fraudulently contrived as part of a scheme and plan for obtaining possession of the railway and its property. The relief prayed for was that the decree of foreclosure and sale and the sale thereunder of the property be vacated and set aside and that the defendants be enjoined from delivering or disposing of any of the bonds or stock of the new Railroad Company provided for in the reorganization agreement. The defendants denied the allegations of the bill in respect to fraud and after evidence taken and a full hearing that suit was dismissed on the merits (*Carey Record, Exhibit B*, pp. 47-68, 1145-1153).

As the court had full and complete jurisdiction of the subject-matter and the parties, the decision there is binding upon the parties and the Stockholders' Committee, and as Lawrence was a depositor with that committee and therefore one for whose benefit that action was brought, he is bound

by the adjudication and, the court having therein refused to enjoin the delivery of the stock and bonds provided for in the reorganization agreement, it there found that the Southern Pacific Company which claimed the stock pursuant to the provisions of the reorganization agreement (not as a stockholder of the old Railway Company, but as a corporation interested generally in the situation and desiring the new Railroad Company operated in harmony with its system) having duly purchased it, was entitled and had a right to the entire capital stock of the new Railroad Company. The claim there advanced was that the Southern Pacific Company was receiving the stock of the Railroad Company in fraud of the minority stockholders; therefore those decisions are direct adjudications that the Southern Pacific Company did not take the stock impressed with any trust, but was absolutely entitled to the same in its own right under the reorganization plan, and the complainants are bound by such conclusions.

In the first of the Gernsheim cases it was sought, among other things, to set aside the foreclosure sales and to enjoin the delivery by the Central Trust Company, as reorganization manager, of the securities provided for by the reorganization agreement. When this relief was denied a second action was brought in which it was attempted to enjoin the Central Trust Company from delivering the stock of the new Railroad Company upon the theory that the assessment made by the Trust Company, which stockholders of the old Railway Company were obliged to pay in order to share in the benefits of the plan, had been fraudulently determined. All relief being denied on the motion for a

preliminary injunction the second case was never brought to trial.

The decisions in these actions determined that the scheme of the reorganization was fair and just and that the Southern Pacific Company was entitled by its purchase to the entire capital stock of the new Railroad Company, and that it took this stock as a corporate entity and not in any way by reason of its holding of the stock of the Morgan Company, and that it did not take the same as trustee and hence was not charged with any trust to the minority stockholders.

As a general proposition, where a former judgment is pleaded in bar it is no objection to its operation as an estoppel that the former action included some parties who are not joined in the present suit or *vice versa*, provided that judgment was rendered on the merits and provided the cause of action in the two suits is the same, and the party against whom estoppel is set up was actually a party to the former litigation. It is also immaterial whether the question alleged to be concluded by the former adjudication was presented as a cause of action or by way of defense or by intervention. Further, an actual trial is unnecessary if the judgment is general and the parties had full legal opportunity to be heard upon their respective claims. It is on the merits, even though there was no actual hearing or argument on the facts.

Fourniquet vs. Perkins, 7 Howard, 160.

A judgment on the merits rendered in a former suit between parties or privies on the same cause of action by a court of competent jurisdiction is conclusive not only as to every matter which was

offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.

Townsend vs. St. Louis Coal Co., 159 U. S. 21;

Green vs. Bogue, 158 U. S. 478;

Fayerweather vs. Rich, 91 Fed. Rep. 721;

Pray vs. Hageman, 98 N. Y. 351;

Smith vs. Smith, 79 N. Y. 634;

Shuman vs. Strauss, 52 N. Y. 404.

Such being the rule of law, it is apparent that the former decisions are binding upon the complainants here in regard to the right of the Southern Pacific Company to receive and retain the \$10,000,000 of stock of the Houston & Texas Central Railroad Company.

SEVENTH POINT.

EVEN IF THE SOUTHERN PACIFIC COMPANY ACQUIRED THE STOCK OF THE NEW RAILROAD COMPANY AS A TRUSTEE FOR THE MINORITY STOCKHOLDERS OF THE OLD RAILWAY COMPANY AND NOW HOLDS A *pro rata* SHARE THEREOF FOR THE BENEFIT OF SUCH MINORITY, THE SOUTHERN PACIFIC COMPANY UPON THE ACCOUNTING SHOULD HAVE BEEN CREDITED WITH THE AMOUNT OF THE JUDGMENTS ENTERED IN FAVOR OF THE MORGAN COMPANY AND THE SOUTHERN DEVELOPMENT COMPANY.

The District Court based the right of the complainants to a recovery upon the theory that the Southern Pacific Company acquired the stock of

the new Railroad Company under the plan of reorganization as majority stockholder of the old Railway Company and subject to any equitable rights which the minority stockholders might have therein (*Record, fol. 848*).

It was stipulated that suits were begun by the Morgan Company and by the Southern Development Company against the old Railway Company in which judgments were entered May 17, 1889, and execution was issued thereon and returned unsatisfied and that said judgments have not been paid (*Record, fol. 698*).

On August 1, 1890, there was due the Morgan Company, including interest, \$1,765,910.44. The value of the collateral held was \$121,666.88, leaving a balance of \$1,644,243.56. The interest adjustment as of September 1, 1890, made the total amount due to the Morgan Company \$1,649,831.12. On August 1, 1890, there was due the Southern Development Company including interest \$892,732.97. The interest adjustment as of September 1, 1890, made the total amount due to the Southern Development Company \$896,036.73 (*Gernsheim, Record, Exhibit D, p. 84*).

The District Court, having held that the Southern Pacific Company was the majority stockholder, refused to permit it to also occupy the position of creditor. The claims of the Morgan Company and Southern Development Company were extinguished by the foreclosure decree. The Southern Pacific Company in acquiring the stock of the Railroad Company gave up whatever benefit it would have received as the majority stockholder of the Morgan Company upon payment of the claim of that company and of the Southern Development Company, another of its subsidiaries. The facts in re-

spect to these claims were fully pleaded in the Seventh separate defense. The appellees, minority stockholders of the old Railway Company, should not be placed in any better position than the majority and should bear and be charged with their *pro rata* share of such claims.

The majority opinion of the Court of Appeals admitted that there was great force in the contention, and then stated that the point had not been raised by the pleadings but first came up before the Special Master in the course of his determination of the amounts expended by the Southern Pacific Company in the acquisition of the stock and of the amounts received by it thereon since such acquisition. It should be borne in mind that the prayer in this action was only that the stock in the hands of the Southern Pacific Company be impressed with the trust in favor of the minority stockholders, and that an accounting be had in which Southern Pacific Company be credited with all moneys paid out on account of guaranties and the expenses of carrying out the reorganization, and be given all proper credits (*Record, fols. 76-79*). It is evident, therefore, that this question arose for the first time after the entry of the interlocutory decree holding Southern Pacific Company liable as majority stockholder. The right to this item could not have been pleaded in answer to any claim set forth in the bill of complaint, but when the accounting was reached the question was at once raised. The matter is no afterthought. The judgments obtained by the Morgan Company and the Southern Development Company were offered in evidence on the trial of the main issue (*Record, Defendant's Exhibits H and I, fols. 775-786*) prior even to the entry of the interlocutory decree for the very purpose of laying

the foundation for the claim when the proper time arrived. The point is preserved by proper exception to the Master's report for failure to charge the complainants with the amount (*Record, fols. 1304-1305*) and error is assigned in failure to permit the Southern Pacific Company to be credited with this judgment as one of the elements of loss to the Southern Pacific Company in agreeing to take all the shares of the new company under the reorganization plan.

Judge HOUGH dissents on this point, and the matter cannot be better and more concisely expressed than in his vigorous language:

"While concurring in the main with the majority, it seems to me plain that defendant should have received credit upon the accounting for such of the floating indebtedness of the Houston &c., Rwy. as it gave up in the reorganization as carried through. We have held the Southern Pacific to an account as a majority shareholder because the majority holder or holders of record were but defendant's puppets—to which proposition I agree.

But defendant when it took all the shares of the reorganized or new company after these plaintiffs had declined to take any, certainly lost what the old company owed to the Southern Development Company and Morgan, etc. Co. in the very real sense of having no one to pay the debts. To have caused the new or reorganized corporation to pay these debts (when Southern Pacific practically owned both debtor and creditors) would have been merely taking money out of one pocket and putting it in the other—the debts would have remained lost just the same.

It is because this defendant owned and controlled the companies which were at once confessed creditors and themselves the immediate controllers of the old Houston &c. Rwy. that

liability has been imposed on defendant; but why plaintiffs should now receive their share of what defendant got without paying their share of what defendant lost is quite beyond me. I think such credit or allowance inheres in the very reasons for our decision. If the Southern Pacific had itself been an unsecured creditor of and majority shareholder in the old Houston &c., Rwy. and the same kind of reorganization had occurred—it is inconceivable that the minority owners would have been let in without paying their share of the floating debt. Yet we seem now to admit them as shareholders, while leaving the burden of unpaid debts to be shouldered by the concern which we hold to have been (in effect) the majority owner. That the point was not placed is immaterial; the matter is a detail of accounting.

As for the difficulty of ascertaining just what was the indebtedness over collateral it may be great; but the legal error below was in refusing to consider the matter at all" (*Record*, fols. 1481-1488).

The case of *Cutting vs. Baltimore & Ohio R. R. Company*, in the New York Supreme Court (35 Misc. 616, aff'd 65 App. Div. 414, appeal dismissed 177 N. Y. 562) is squarely in point. If in the case at bar Southern Pacific Company is held to be the majority stockholder the opinion of the trial judge in that case might well have been written for the instant case.

The present decision permits, as Judge HOUGH points out, the minority stockholders to get the new stock on better terms than the Southern Pacific obtained it, and as Judge MAREAN pointed out in the *Cutting* case, equity does not give the minority shareholders profit, but only indemnity.

EIGHTH POINT.

TO COMPEL PHYSICAL DELIVERY OF THE SHARES OF STOCK OF THE NEW RAILROAD COMPANY WHICH ARE NOW PLEDGED UNDER THE FRENCH LOAN AGREEMENT WOULD RESULT IN GREATER HARDSHIP TO THE SOUTHERN PACIFIC COMPANY THAN BENEFIT TO THE COMPLAINANTS, AND SHOULD NOT HAVE BEEN DECREED.

The summons and complaint in this suit were served July 28, 1913. Prior thereto and under date of March 1, 1911, the French Loan agreement was entered into. This agreement was executed by The Central Pacific Railway Company and Southern Pacific Company to United States Trust Company of New York, as Trustee, to secure an issue of 4 per cent, thirty-five-year bonds of the par value of 250,000,000 francs. The payment of the principal and interest of these bonds was unconditionally guaranteed by the Southern Pacific Company.

As security for the performance of its covenants and guarantee the Southern Pacific Company pledged certain securities among which were all of the shares of the new Railroad Company with the exception of directors' qualifying shares (*French Loan Agreement*, p. 22).

This agreement contained among other things the following clauses:

(a) "The Company (Southern Pacific Co.) covenants and agrees that it is the lawful owner of said securities and that the same have been lawfully created and issued, are fully paid and are not subject to any prior pledge, charge or equity" (p. 22).

(b) Prior to default in any of the provisions of the trust indenture, the Company was given the right to withdraw all (but not less than all) the securities of any one issue and to substitute other securities of not less appraised value than the last previously appraised value of the securities so to be withdrawn, *provided, however*, that upon each and "every withdrawal and substitution the securities offered in substitution, in each instance, shall be (1) of a character approved by the Appraisers appointed hereunder and shall be (2) equal in appraised value, at the time of the proposed substitution hereunder, to the last previously appraised value of the securities to be withdrawn; and also that (3) the securities offered in substitution and those remaining on deposit (in each instance), shall be equal in value, as appraised or reappraised, at the time of such proposed substitution to one hundred and twenty per centum (120%) of the amount of bonds then outstanding hereunder; and, provided further, (4) that the aggregate interest and dividends during each of the two years immediately prior to the proposed substitution actually paid upon the securities offered in substitution and upon the other securities remaining on deposit hereunder, shall have been equal to at least 120% of the interest payable on the bonds then outstanding hereunder" (p. 23).

(c) The usual clauses relating to declaring the principal of all outstanding bonds due and payable immediately upon default made "in the due and punctual observance or performance of any of the terms, covenants, conditions or requirements contained in said bonds and this Indenture" (p. 29).

The conditions, therefore, upon which the stock of the new Railroad Company could be withdrawn from the pledge required the withdrawal of *all* of said shares and not merely such as were directed by the final decree to be delivered to the minority stockholders. Upon the withdrawal of said shares of stock only such securities could be substituted as were approved by the Appraisers and which were of value equal to the last appraised value of said stock. In addition any depreciation at that time in the value of the remaining securities, must be taken care of. This could only be done by pledging additional securities to make up such depreciation. There is a provision that "no reappraisement of the securities remaining on deposit shall be made or required in connection with the withdrawal of securities (not exceeding \$5,000,000 in the aggregate of appraised value) requested prior to September 1, 1911" (*French Loan Agreement*, p. 23). The total of the Railroad Company's stock at the appraised value was less than \$5,000,000, but no claim was ever made for delivery of the securities to complainants until 1915, the year in which the interlocutory decree was entered and until that time the claim was believed to be one for damages alone. No request was made prior to September 1, 1911, so this provision can have no application and an appraisal of all the securities under the loan is required.

The Southern Pacific Company sought before the Special Master to establish the market value of the remaining securities pledged and offered to prove that upon a reappraisement under said agreement the appraised value of certain of the remaining securities was materially less than the appraised value as set forth in said agreement (*Record*, fol.

941). Upon objection to this offer by counsel for the complainants, a motion was made to the District Court asking that the scope of the matters referred to the Special Master be enlarged so as to permit testimony as to such values to be taken in Texas or by open commission (*Record*, fol. 948). This motion was denied (*Record*, fols. 1000-1005). The Southern Pacific Company also sought to prove the market value of the stock of the Railroad Company (*Record*, fols. 1016-1044). Testimony seeking to establish such value was objected to and the objection sustained (*Record*, fols. 1017-1049; *Defendant's Exhibits for identification A-F*; *Record*, pp. 412-428). Exception was duly taken. Error is assigned to the sustaining of such objections.

The Southern Pacific Company was therefore not permitted to establish that in order to withdraw the stock of the new Railroad Company it would have been required to deposit in lieu thereof additional securities to make up a deficiency then existing in the market or appraised value of securities remaining. No charge of fraud or collusion has been made and none was established and there is no reason for subjecting the Southern Pacific Company to this additional hardship. No reason has been given or established why the complainants would not be fully compensated by payment of the balance of the market value of the stock of the new Railroad Company after deducting therefrom whatever sum is properly payable by them as their share of carrying out the plan of reorganization.

The decree entered is one requiring specific performance. The complainants have not established that the stock in question has any particular value to them and have not established that any circumstances exist which entitle them to a decree direct-

ing specific performance and physical delivery of the stock. We submit that a money payment would adequately compensate them and that such is the only relief which should be awarded under any circumstances. The decree entered, however, subjects the Southern Pacific Company to a reappraisalment of all the pledged securities and the deposit of additional securities to meet a deficiency. To this hardship it should not be subjected.

See

Willard vs. Tayloe, 8 Wall. 557 at 567.

Shubert vs. Woodward, 167 Fed. Rep. 47 at 60.

Leicester Piano Co. vs. Front Royal & River-ton Imp. Co., 55 Fed. Rep. 190 at 205.

NINTH POINT.

IT WAS ERROR TO PERMIT THE EXECUTRICES OF CHARLES MINZESHEIMER AND TO PERMIT MICHAEL GERNSHEIM TO INTERVENE.

After the entry of the interlocutory and prior to the entry of the final decree petitions were filed by (a) executrices of Charles Minzesheimer and (b) Michael Gernsheim to intervene on the ground that they were situated similiarly to complainants.

(a) The proof taken in support of the petition filed by the executrices of Charles Minzesheimer failed to sustain the conclusions of the Special Master (*Record, fol. 1292*), and did not establish ownership in this testator of the shares of stock at the time of the act complained of in the bill of complaint.

In April, 1916, the certificates were found by one of the executrices in the safe deposit box standing in the name of Charles Minzesheimer. One of the certificates stood in the name of Edward Colgate, was dated August 31, 1883, was endorsed and transferred in blank September 6, 1886, by Edward Colgate, whose signature was witnessed by Horace P. Gates and guaranteed by Clark, Dodge & Company (*Record*, fol. 1174). The second certificate stood in the name of Stewart Brown's Sons, was endorsed and transferred in blank by that firm, September 11, 1886, whose signature was witnessed by James J. Kernoghan (*Record*, fols. 1176-1180).

This proof fails to establish that Minzesheimer owned or even received the certificates prior to the commencement of the present suit. There is no evidence as to when he received them. All that was established was that the two certificates which did not stand in his name and which do not show that they were transferred to him were found in his safe deposit box shortly after his death. Such proof would not have entitled Minzesheimer to maintain a suit in his own name and does not entitle him to intervene in the present suit.

There was no proof authorizing the Special Master to find that Minzesheimer owned the stock at the time of the acts complained of in the bill of complaint.

Minzesheimer never deposited his stock with the minority stockholders' committee. He did absolutely nothing to protect his rights for upwards of twenty-eight years. His laches cannot be excused by what other minority stockholders may have done or were attempting to accomplish. He was bound to protect his own rights.

Matter of Sillcocks, 62 App. Div. 127.

His laches should have deprived him of the right to intervene.

Patterson vs. Hewitt, 195 U. S. 309.

Twin Lick Oil Co. vs. Marbury, 91 U. S. 587.

Central R. & Banking Co. vs. Farmers Loan & Trust Co., 112 Fed. Rep. 81.

(b) Gernsheim was plaintiff in the Gernsheim suits. He actively attempted to be relieved from the effect of the foreclosure decree, the reorganization agreement and steps taken thereunder by having them set aside on the ground of fraud and collusion. He refused to be bound by the foreclosure decree and plan of reorganization or to take any benefits thereunder. He disaffirmed. His application for intervention proceeded upon a theory diametrically opposed to that of the present action. He now seeks to affirm and obtain the benefits granted to complainants under the foreclosure decree and plan of reorganization. Equity should not now permit him to take a position entirely inconsistent with the one taken twenty-five years earlier.

Under the authorities cited under the headings of Estoppel and Election of Remedies in the Sixth Point of this brief his application for leave to intervene should have been denied.

TENTH POINT.

NO RELIEF SHOULD BE GIVEN ON THE ORIGINAL PETITIONS FILED IN THIS COURT BECAUSE PETITIONERS ARE NOT SIMILARLY SITUATED AS COMPLAINANTS AND TO GRANT SUCH RELIEF WOULD DEPRIVE THE DEFENDANT OF GOOD AND VALID DEFENSES.

Subsequent to the granting of the *certiorari* herein five original petitions were filed in this court praying for leave to intervene. Answers thereto were interposed pointing out wherein petitioners were differently situated from the complainants and also showing lack of equity. This court directed that the petitions stand over until the hearing of the appeal, so such petitions come up for disposition at the present time.

All the petitions except that of Polack show that petitioners acquired their stock over twenty-five years ago and during the intervening time made no inquiry or attempt to discover or enforce any rights they might have. This certainly is a very different situation from that of complainants whose misdirected activities were held sufficient to excuse their laches. Here petitioners had slept soundly all these years and there has not been even a protest from them. Surely under such circumstances laches is a good defense, and yet were the petitions granted such defense could not be presented. The language of Chief Justice FULLER in the case of *Hammond vs. Hopkins*, 143 U. S. 224 (274) is in point:

" * * * The welfare of society demands the rigid enforcement of the rule of diligence, the hour glass must supply the ravages of the

scythe and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused."

The only reasons advanced for not compelling petitioners to bring their own action is that the time of the court will be consumed and petitioners put to expense. We have yet to see a court of equity grant relief on such ground where the result would be to bar perfectly valid and meritorious defenses. Furthermore, the rule as to interventions is that unless there is a fund in court about to be distributed, to part of which petitioner is entitled, or a decree entered which might operate prejudicially to petitioners' rights, an intervention will not be allowed after final decree unless filed at the same term.

Bronson vs. Schulten, 104 U. S. 410 (415) ;

Sibbald vs. U. S., 12 Peters 411 ;

Philips vs. Negley, 117 U. S. 665 ;

City of Manning vs. German Insurance Company, 107 Fed. Rep. 52.

The rule is that petitions for intervention will not be granted as a matter of course and that they ought not to be granted "unless it is necessary to do so to preserve some right that cannot otherwise be protected or to avoid some complication which is liable to arise".

United States vs. Northern Securities Company, 128 Fed. Rep. 808.

None of the petitioners has brought himself within this rule. Each still has the right to bring an independent action. The decree entered in no way prejudicially affects his rights and in no way

attempts to distribute property in the hands of the court upon the distribution of which all rights therein would be effectively cut off.

The decree entered made ample provision for every stockholder who might avail himself of its provisions in due time, so the instant applications are in no way analogous to *Johnson vs. Waters*, 111 U. S. 640, or *Continental Trust Company vs. Toledo, &c., RR. Co.*, 82 Fed. Rep. at 642.

In addition to the above, in the O'Reilly application it appears that such petitioner deposited with the stockholders' committee in 1890 twelve hundred out of fourteen hundred shares then owned by him, that he afterwards acquired six hundred additional shares, so that said petitioner is sharing in the recovery herein to the extent of twelve hundred shares deposited with the committee, and as to the eight hundred in respect to which he did nothing, though aware of every move made, he now, after thirty years of inaction, wants to share in the recovery. If there ever was a case where laches was a complete answer it is here, and yet the granting of the petition would eliminate that defense.

The Polack application is still more flagrant. Petitioner bought his four hundred shares of stock at public auction on December 20, 1916, (after the entry of the final decree) paying for the entire lot the sum of \$65.16, which included the sales fee and the cost of the necessary stamps. He alleges if permitted to intervene he will become entitled to stock worth \$140,000. Under such circumstances this Court will not, by granting the petition, bar out proper defenses. Polack should certainly be remitted to an independent action.

In the interests of brevity, we beg leave to refer

to the answers and briefs filed on the return of said petitions and to pray that they may be deemed to be filed herein, and that the court refer thereto for particulars and amplification of the matters outlined above.

ELEVENTH POINT.

THE DECREE SHOULD BE REVERSED AND THE COURT BELOW DIRECTED TO DISMISS THE BILL OF COMPLAINT.

Respectfully submitted,

ARTHUR H. VAN BRUNT,
LEWIS H. FREEDMAN,
Counsel for Southern Pacific Company.

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Supreme Court of the United States.

OCTOBER TERM, 1918.

SOUTHERN PACIFIC COMPANY,
Petitioner,

against

HENRY L. BOGERT, *et al*, as Ex-
ecutors, etc., et al,
Respondents.

No. 305.

Brief for Respondents, Who Were Plaintiffs Below.

The respondents will be referred to as "plaintiffs" and the petitioner, as "defendant".

As we cannot accept the statements in the briefs filed on behalf of defendant as either complete or accurate, we shall present one of our own.

Statement of the Case.

This suit was commenced in the Supreme Court of the State of New York, in July, 1913, and removed by defendant to the United States District Court for the Eastern District of New York.

The purpose of the suit was to enforce a constructive trust and to obtain a decree that the defendant, which had acquired stock in the Houston & Texas Central Railroad Company, held such stock in part, at least, as trustee for the plaintiffs.

Defendant then moved to dismiss on the pleadings. The motion was denied, and an opinion written by Judge Chatfield (Record, p. 137).

Thereupon defendant moved for a trial of its separate defenses. This motion was granted and a trial had, and defendant's motion for judgment on the separate defenses was overruled (see opinion by Judge Chatfield, *id.* p. 204).

The trial was had before Judge Chatfield, and an interlocutory decree entered for the plaintiffs; see opinion (*id.* p. 263).

A reference took place before a special master, whose report was affirmed (*id.* p. 429), and a final decree entered in plaintiff's favor, in which *each allegation contained in the complaint was found to be true* (*id.* p. 439).

The Circuit Court of Appeals unanimously affirmed the decree; Judge Hough dissenting in part only to the effect that defendant should have been allowed certain credits. (*id.* p. 491).

A petition for rehearing was denied, and on defendant's application a writ of certiorari was granted by this court.

By stipulation (*id.* p. 144) it was agreed that certain records in former cases shall be considered in evidence, and either party may be at liberty to use or quote from the same, and it was further agreed that a stipulation contained in such records shall have the same force and effect as though made in the present record.

By further stipulation (*id.* p. 477) it was agreed

that the various exhibits, too bulky to be printed, need not be reproduced in this record, and this stipulation was made both in the District Court (*id.* p. 477) and in the Circuit Court of Appeals (*id.* p. 515).

We understand that the defendant obtained an order from this court, allowing the same exhibits to be used in this court. These exhibits are:

Defendant's Exhibit B: The printed record in the case of *Carey v. Houston & Texas Central Railway Co.*, on appeal to the United States Circuit Court of Appeals, for the Fifth Circuit (*id.* pp. 143, 144).

Defendant's Exhibit C: The printed record in the case of *Gernsheim v. Olcott*, on appeal to the General Term of the Supreme Court of the State of New York, First Department (*id.* p. 144).

Defendant's Exhibit D: The printed record in the case of *Gernsheim v. Central Trust Co.*, on appeal to the General Term of the Supreme Court of the State of New York (*id.* p. 144).

Defendant's Exhibit E: The printed record in the case of *MacArdell v. Olcott*, on appeal to the New York Court of Appeals (*id.* pp. 144-145).

Defendant's Exhibit F: The printed record in the case of *Lawrence v. Southern Pacific Co.*, on appeal to the United States Supreme Court (*id.* p. 145).

Complainant's Exhibit 11: Being the 29th Annual Report of the Southern Pacific Co. (*id.* p. 478).

Complainant's Exhibit 14: Being the so-called French Loan Agreement (*id.* p. 477).

All of these records are available under the stipulation to either party. They are referred to in the brief as "Carey Record", "MacArdell Rec-

ord", "Southern Pacific Report", "Gernsheim Records", etc., etc.

Prior Litigations.

In view of the stipulation above referred to, and the numerous references made in the briefs of the defendant, as well as this brief, to the prior litigations, we briefly call attention to the substance of such previous litigations, most concisely referred to in the opinion of Judge Chatfield, overruling defendant's motion for judgment on the separate defenses (Record, p. 204), wherein he states, at page 209, as follows:

"The various suits which have been instituted and the decisions rendered thereon need not be discussed, but should be enumerated as follows:

Carey vs. H. & T. C. Ry. Co., 45 Fed. 438 (1891); 52 Fed. 671 (1892), C. C. E. D., Tex.; stockholders held not entitled to decree enjoining carrying out of plan of reorganization or to have foreclosure set aside as fraudulent.

Carey vs. H. & T. C. Ry. Co., 150 U. S. 170 (1883); appeal to Supreme Court from decree of Circuit Court dismissed.

Carey vs. H. & T. C. Ry. Co., 9 C. C. A. 687; 13 U. S. App. 729 (1894); decree of Circuit Court affirmed by Circuit Court of Appeals for the Fifth Circuit.

Carey vs. H. & T. C. Ry. Co., 161 U. S. 115 (1896); appeal to Supreme Court from decree of Circuit Court of Appeals dismissed.

Gernsheim vs. Olcott, 7 N. Y. Supp. 872 (1889); 10 N. Y. Supp. 438 (1890); *Gernsheim vs. Central Trust Co.*, 16 N. Y. Supp. 127; 61 Hun. 625 (1891); stockholders held not entitled to reduction of assessment or to injunction against distribution of stock of new company under reorganization.

McArdell vs. Olcott, 104 App. Div. 263 (1905); 189 N. Y. 368 (1907); action by stockholders to set aside foreclosure sale and annual reorganization agreement on ground of fraud dismissed.

MacArdell v. Olcott, 62 App. Div. 127 (1901); application of stockholder for leave to intervene denied for laches.

Lawrence vs. Southern Pacific Co., 165 Fed. 241 (1908); 177 Fed. 547 (1910); 180 Fed. 822 (1910); C. C., E. D., N. Y.; action by stockholder for accounting and other relief; motions to remand denied and suit dismissed.

Bogert vs. Southern Pacific Co., 228 U. S. 137 (1913); appeal to Supreme Court from decree of Circuit Court in *Lawrence vs. Southern Pacific Co.* (supra) dismissed.

MacArdell vs. Olcott, N. Y. Court of Appeals, October 29, 1907, 189 N. Y., 369, affirming 104 App. Div. (supra), with statement of limitations in the complaint."

The foregoing case of *Bogert v. Southern Pacific*, 228 U. S. 137, was dismissed for want of jurisdiction in this court.

The Circuit Court of Appeals, speaking of these prior litigations, says:

"The merits were not passed upon in any of these cases, each being dismissed on the ground that the decree of foreclosure could not be attacked collaterally because there was no proof of fraud and in the last case supra (*Lawrence vs. Southern Pacific Co.*) (180 Fed. 822; 228 U. S. 137) because the Railway Company was an indispensable party." (Record, p. 486.)

Statement of Facts.

This suit is on behalf of minority stockholders of the Houston & Texas Central Railway Company (hereinafter called the "Railway Company") defunct since 1888, against the Southern Pacific Company, which controlled the Railway Company by electing its board of directors through its control of a majority of the stock of the Railway Company, held by Morgan's Louisiana & Texas Railroad & Steamship Company (hereafter called the "Morgan Company"), one of the subsidiaries of the Southern Pacific Company.

The trial court found that "*each and every allegation contained in the complaint of Henry L. Bogert and others, is true*" (Record, p. 439). This finding was unanimously affirmed by the Circuit Court of Appeals (Judge Hough not dissenting on the facts. See Record, p. 491).

The facts thus found by two courts, in accordance with the familiar rule, will be accepted by this Court.

Dravo v. Fabel, 132 U. S. 487;

Towson v. Moore, 173 *id.* 17;

Brainard v. Buck, 184 *id.* 99;

Dun v. Lumbermen's Credit Ass'n, 209 *id.* 20;

First National Bank of Princeton v. Littlefield, 226 *id.* 110;

Baker v. Schofield, 243 *id.* 114.

There can be no reasonable contention that, under this rule any controversy about the facts is not open in this court.

Many of the statements of fact on which the whole reasoning in the briefs of our adversaries rests, can be supported only by arguing that the findings of the two courts below are wrong, a few instances more fully referred to hereafter are;

(a) The statement (page 2 of the main brief) that the only evidence of control by the Southern Pacific Company of the old railway company is the election of directors, is flatly controverted by the findings of both courts and by the undoubted fact that the Southern Pacific Company undertook to exercise control and made for the old railway company the reorganization hereinafter discussed.

(b) The reiterated statement (pages 24, 25, 26-32 of the main brief) that in none of the previous litigations had plaintiffs demanded possession of their stock must rest on the assumption that when the plaintiffs demanded an accounting for the stock received by the defendant, they expected to be content with the accounting without receiving the stock shown to belong to them;

(c) The claim that there was a litigated and resisted and not a consent foreclosure is flatly in the face of the findings of the two lower courts and opposed by every fact in the case;

(d) The claim that the reorganization plan was widely advertised and notice given by such advertisements to the plaintiffs (page 13 of additional brief) is flatly negatived by the court below (Record p. 273), and if the advertisements are examined, it will appear that they were all addressed to bondholders and not to stockholders.

(e) The claim that the Income and Indemnity mortgage for \$1,500,000 was due and could be fore-

closed is true to the extent that the mortgage was due, but it is affirmatively found by the court below (*id.* p. 269) that as a matter of fact all of the bonds under this mortgage had been exchanged for general mortgage bonds except one \$500 bond, which was lost.

All of the facts found by the two courts in this case are admittedly supported by the evidence. We briefly state the facts thus found:

The Railway Company was one of the oldest in the State of Texas, and until the Morgan Company obtained control of it in 1877, was very prosperous. From 1877, to the time of foreclosure, the Railway Company paid no dividends, and after 1881, nearly every year's operations resulted in a deficit. In 1881, the stock sold above par on the New York Stock Exchange, and fell to about a dollar a share in 1888, the year of the foreclosure (Carey record, p. 751).

The Railway Company had executed seven different mortgages to various trustees, to secure seven different issues of bonds (Complaint, Record, p. 5). None of these mortgages contained any provision allowing foreclosure for non-payment of interest, taxes or any other default, except for non-payment of principal, when due, and the principal of these mortgages was not due for many years after 1888 (Par. 18 of Complaint, *id.* p. 11) (MacArdell record, Ex. E., p. 291; p. 681). One of these mortgages was known as the *Income and Indemnity mortgage*, and all of which bonds (except one for \$500. which was lost) were surrendered and exchanged for general mortgage bonds (Complaint, par. 6, Record, p. 5; opinion of Judge Chatfield, *id.*, p. 269).

The Railway was organized under the laws of the State of Texas, and operated about one thousand miles of railroad in that state.

Its authorized capital stock was 100,000 shares but only 77,269 shares were issued.

The State of Texas, for the purpose of aiding the construction of the Railway, had granted to the company over four million acres of public lands in Texas.

More than a majority of the outstanding capital stock of the Railway Company (approximately \$4,000,000, par value out of a total issue of \$7,726,900) was owned by the Morgan Company, and the defendant, Southern Pacific Company, owning more than a majority of the stock of the Morgan Company, controlled, selected and elected the officers and directors of the Railway Company (see Complaint, *id.* pp. 5, 6), so much so, that Judge Hough, in his opinion, said that:

“We have held the Southern Pacific to an account as a majority stockholder, because the *majority* holder or holders of record were but defendant's puppets—to which proposition I agree” (*id.* p. 491).

In 1885, the Southern Development Company controlled by Collis P. Huntington, operating in the Defendant's interest (Carey record, p. 148), and for all practical purposes the same as the Defendant, (Defendant's “Additional Brief,” p. 20), filed a bill against the Railway Company, on behalf of itself and of the floating debt creditors (the two principal ones being the Morgan Company and the Lackawanna Steel Company) and obtained the appointment of receivers for the Railway Company, in the District Court in Texas, without notifying any of the mortgage trustees.

The Railway Company, whose officers and directors were all Southern Pacific men (*id.* fol. 91), filed its answer, consenting to the appointment of receivers and admitting all the material allegations of the bill (Carey record, p. 910).

Shortly thereafter, the trustees of the different mortgages, learning of this receivership, intervened and demurred to the Southern Development bill, and the demurrers were sustained and the bill dismissed in May, 1886 (Record, p. 265).

Because of the Railway's control by the Southern Pacific interests, and its refusal to defend itself in the floating debt creditors' suit, the trustees of the different mortgages, after the Southern Development suit was begun, filed bills of foreclosure against the Railway Company, alleging, among other things, that the Southern Development Company suit was collusive and that the Railway Company was being run in the interest of the Morgan Company and the Southern Development Company, and not for the benefit of the Railway. These foreclosure bills contained substantially the same allegations.

The foreclosure bill of the Main Line Mortgage contained the following allegations (p. 190 of the Carey record):

"That the majority of the stock of the Houston & Texas Central Railway Company is and prior to and since the 1st day of January, 1885, has been owned and possessed and voted upon by a certain corporation created and existing by and under the laws of the State of Indiana, entitled the Morgan's Louisiana & Texas Railroad & Steamship Company."

Then follows the allegation of stock ownership of the Morgan Company by the Southern Development Company, and the control of the Railway Company by these companies, and continues:

"That said last named corporation, by such ownership of the stock of said Morgan's Louisiana & Texas Railroad & Steamship Company, was and is able to control said last named company, and to guide and prescribe its voice and vote in respect of stock of the Houston & Texas Central Railway Company, and to name and elect the officers and directors of said Houston & Texas Central Railway Company, and that it did so name and elect said officers and directors, and made the same person, to wit, Alexander C. Hutchinson, president of both said Morgan's Louisiana & Texas Railroad & Steamship Company and said Houston & Texas Central Railway Company."

(Said A. C. Hutchinson was also at that time general manager of the Atlantic System of the Southern Pacific Company and an officer, director, president and general manager of numerous other of the defendant's subsidiary companies; Mac-Ardell record, p. 234, fol. 935).

Then follows (at page 191 of the Carey record) the allegations concerning the institution of the Southern Development suit, and the fact that the trustees for the mortgages were not notified and receivers were appointed by consent of the Railway Company, which did not avail itself of its obvious defenses, and without giving the bondholders an opportunity to present their rights to the court; and that subsequent to the appointment of the said receivers, the trustees for the bondholders were granted leave to intervene in

the suit (*id.* p. 192). Continuing at page 195, they allege:

“That these complainants are informed and believe and allege that it is the intention and design of the said Houston & Texas Central Railway Company and of the said Southern Development Company so controlling the said Houston & Texas Central Railway Company through the Morgan’s Louisiana Railroad & Steamship Company, to keep the property of the said Houston & Texas Central Railway Company in litigation and in the hands of the said receivers, and to obstruct and prevent the payment of interest for an indefinite period, until the holders of bonds secured by said trustees shall be worn out and shall be compelled to sacrifice a large part of the interest on said bonds, and to sell the same much below their par value.”

The Houston & Texas Central Railway Company answered these foreclosure bills by their attorneys, who *were the local counsel for the Southern Pacific Company in Texas matters*, and also appeared for the Southern Development Company, the Morgan Company and the Lackawanna Steel Company in the foreclosure suit (Carey record, p. 969).

Mr. Davenport, attorney for Easton and Rintoul, trustees of the Main Line mortgage, testified that he had no intention of bringing foreclosure suits until the receivership in the Southern Development suit on behalf of the floating debt creditors, saying at page 659 of the Carey record:

“Q. At the time of the bringing of that suit, had you determined filing your bill for foreclosure? A. Oh, no.

Q. Did the bringing of that suit influence you in bringing your foreclosure suits? A. Well, I think the existence of the suit did."

The Railway Company was not manoeuvred into a position where it could default on its coupons until 1885, so that, when the foreclosure suits were commenced in 1886, there was only a year's default, and the income from the operation of the road with the sale of some of the lands would, of course, have easily paid the past due interest (Carey record, pp. 254-255, P. XII, Railway's ans. to foreclosure bill), so that the trustees of the different mortgages never contemplated a foreclosure until the defendant's hand was disclosed in the Southern Development receivership.

When the mortgage trustees found that the Railway was being operated by the Southern Pacific interests, and that they were apparently trying to obtain possession of the Railway in behalf of the floating debt creditors, they alleged this fact in their bills of foreclosure as a reason why a court of equity should grant them a decree,, although the mortgages did not provide for the maturity of the principal on default of interest.

The Railway Company answered these foreclosure bills in 1886, and in May of the same year, the Southern Development bill on behalf of the floating debt creditors was dismissed and their receivers discharged; and thereupon receivers were appointed on behalf of the mortgage trustees and the different foreclosure actions consolidated in what was known as Consolidated Suit No. 198 (Record, p. 267).

The answers of the Railway Company denied that the principals of the mortgages were due, and alleged that the earnings of the company and

a sale of the lands should first be applied to the payment of interest, even after the mortgages became due (*id.* pp. 10-11, and 266, 267).

The lower courts found, as a fact, that "*said defenses were valid, legal defenses to the said suits, and each and all of them, and could not be overcome save by the consent of the said Railway Company*", and that these defenses "*were never overcome in said litigations*" (see complaint, par. 21, pp. 12, 13 of Record).

The situation in the litigation between the Railway company and its mortgage creditors after the answers of the Railway company were put in was completely deadlocked. Some of the mortgages were only on individual branches of the Railway, so that if they were foreclosed the Railway system would be disrupted. Cross-litigations between the bondholders themselves had arisen, arising out of an uncertainty as to what disposition should be made of the rolling stock of the road in case of success in the foreclosure suits. The complainants were also brought to a standstill by the proposition that they had no right to foreclose for non-payment of interest, but only for non-payment of principal. They were confronted by the further defense that all of the mortgages stipulated that the land should be sold before any sale of the railway proper took place.

With these litigating mortgage creditors the Southern Pacific Company entered into negotiations for a compromise, which took the form of the reorganization agreement attached to the bill as an exhibit.

While the Central Trust Company is made agent to carry out the terms of the reorganization agreement, its functions ended there, and it had

no beneficial interest in the agreement. The real agreement was between the Southern Pacific Company on one side and the different classes of mortgage bondholders on the other side.

The scheme of the reorganization apparently gave to the minority stockholders a right to take stock in the new company on paying a pro rata share of the floating debt and expenses. As Judge Chatfield said (Record, p. 274):

"A reorganization was to be effected. The Southern Pacific Co. was to purchase the property while the rights of the minority in that property were admitted by the Southern Pacific Co. The only room for argument would have been the amount which the Southern Pacific Co. could exact from the minority stockholders, and as this was to be computed or, in other words, to be determined in the future, the obligation of the Southern Pacific Co. to do this properly and to respect the legal rights of the minority stockholders was recognized in the foreclosure decree"

As a matter of fact the terms subsequently ascertained and offered to the minority stockholders were prohibitive. The pretense that they were offered a chance to come in and acquire new stock was wholly illusory. When the computation came to be made as to what the assessment on the minority stockholders would be, it turned out to be over \$71 per share of new stock.

On the other hand, for all stock which the minority shareholder should not take it was directed by the terms of the reorganization agreement was to go to the Southern Pacific Company on the payment of mere reorganization expenses and some other items which brought the price to the Southern Pacific Company of the new stock to

a little over \$26 per share. Thus the reorganization in effect, and when it is translated into its ultimate consequences, directed that no stockholder should have a real chance to obtain stock in the new company, but that all the stock should go to the Southern Pacific Company.

By Paragraph Tenth of the reorganization agreement (Record, p. 52) the contingency of no subscriptions being accepted under these prohibitive terms by the minority stockholders is dealt with, and it is provided that in that contingency the Southern Pacific Company or its appointee "shall be entitled to the entire balance of the stock of the new company". All that the Southern Pacific Company had to pay for this entire balance of stock in the new company brought the price of the stock to \$26 a share for the Southern Pacific Company.

It will, perhaps, be useful to point out succinctly here what was given and taken in the bargain made in the reorganization agreement between the Southern Pacific Company on the one hand and the litigating bondholders on the other hand.

The litigating bondholders received

- (a) power to foreclose their mortgages hitherto unforecloseable (*id.* p. 28);
- (b) power to declare the principal of their bonds due (*id.* p. 42);
- (c) new bonds in exchange, which were to be secured by effective mortgages which could be foreclosed for non-payment of interest (*id.* p. 49);
- (d) bonds secured by mortgages covering the whole railway system and not mere branches (*id.* pp. 43, 44);

- (e) the guarantee of interest on the bonds and of the principal of debenture bonds by the Southern Pacific Company (*id.* p. 48);
- (f) other improvements in the form of the mortgages securing the new bonds (*id.* pp. 48-49).

The Southern Pacific Company received

- (a) The right given by Paragraph Tenth of the reorganization agreement. This paragraph (*id.* p. 52) gave to the Southern Pacific Company the right to all of the capital stock of the new company on payment of expenses and charges only, unless some portion of the new stock should be taken under the prohibitive terms allowed to floating-debt creditors and stockholders of the old Railway company.
- (b) The right to dictate terms in the reorganization agreement against the minority stockholders of the old company that would be effective in preventing any minority stockholder in the old company from attempting to obtain stock in the new company.

It is obvious that the bargain which the Southern Pacific Company made with the litigating bondholders could only be carried out through the Southern Pacific Company's control of the old Railway company. The Southern Pacific Company's agreement that the principal of all bonds should be declared due (*id.* p. 42) involved an agreement that the main defense to the foreclosure suit should be abandoned, and such renunciation

of this defense could only be made by the old Railway Company which interposed the defense.

The Southern Pacific Company was thus making a bargain for the old Railway Company effecting a compromise between the old Railway Company and its mortgage creditors. The mortgage creditors agreed to scale down interest and remit some claims, thus enhancing the value of the stock to the new company, and then agreed that the Southern Pacific Company on the reorganization should have the preferential right to get the stock in the new company on better terms than were offered to anyone else. What the Southern Pacific Company *gave* belonged to the Railway Company; what it *received*, it kept for itself.

POINTS.

I.

The defendant controlled and directed the acts of the Railway's Board of Directors.

The Morgan Company, in 1877, bought the majority stock of the Railway Company. The Southern Development Company, which was controlled by Collis P. Huntington, who owned about 20% of its stock, in 1883 purchased a majority of the stock of the Morgan Company (Carey record, p. 172).

Defendant's counsel says at p. 24 of his "Additional Brief" "*the Defendant and the Southern Development Co. were for all practical purposes the same.*"

The Southern Pacific Company, in 1885, bought the Morgan stock from the Southern Development Company. Huntington was the controlling stockholder, director, Vice-President and subsequently President of the Southern Pacific Company during the period in which the acts complained of took place, prior to the foreclosure in 1888 (Carey, record, p. 172, par. 9).

The Southern Development Company was never actually owned by the Southern Pacific Company, but it was controlled by the same interests.

The Morgan Company was controlled by the Huntington interests prior to the acquisition by the Southern Pacific of its stock, through the Southern Development Company, which held the majority of the stock of the Morgan Company prior to the sale of said stock to the Southern Pacific Company in 1885 (Stipulation of facts in Carey record, pp. 172, 173).

The directors of the Railway Company, for the four years preceding the foreclosure, were Collis P. Huntington; J. J. Atkinson; Charles Dillingham; A. H. Swanson; E. W. Cave; Charles Fowler; Isaac E. Gates; J. Schrieber (MacArdell record, p. 233). *All but one of these directors were officers and directors of the defendant or its subsidiary companies* (Record, p. 264, fol. 791).

In the MacArdell case (189 N. Y. 368), the court said at page 372:

“The respondent Southern Pacific Company, indirectly and through its control of said corporation, was the holder of a majority of the stock of said Company.”

And, at page 376:

“And in control of the Houston Company.”

And, at page 385:

“The result was that Huntington and his associates, by means of their control of the Morgan Company, elected the officers and directors of the Houston Company No. 1.”

Judge Hough said, (Record p. 491) “we have held the Southern Pacific to an account as a majority stockholder, because the majority stockholder of record was but defendants’ puppet—to which proposition I agree.”

This control by defendant of the Railway Company prior to the foreclosure is alleged in the bill of complaint (*id.* p. 6) and so found by the trial court (*id.* p. 264).

The defendant did not seriously controvert this fact, but it now urges, that because the Southern Pacific Company was not a stockholder of record of the Railway Company, it cannot be compelled to restore to the minority stockholders their share of stock obtained by defendant in the foreclosure through its control of the Railway Company, *exercised through its officers and board of directors.*

We submit, in determining the rights of the minority stockholders in a case of this character, that the court goes beyond the legal entity, and inquires into the fact of actual control.

The authorities all hold that the trust relationship that we invoke in this case does not depend upon mere stock ownership in a corporation, but is applied where there is an *exercise of control* by the dominating corporation, for its own benefit and against the interests of the minority. The method of obtaining control is immaterial. It is usually done through direct majority holdings of

stock, so that most of the cases involving this doctrine are cases of a majority stockholder, and the rule has become popularly known as the majority stockholder's rule.

The result accomplished is what governs the application of this rule, not the method of obtaining control of the corporation. Although the control is usually exercised through direct holding of stock, it can be done by majority control of stock or through subsidiary companies, or proxies obtained from other stockholders, or improper influence brought to bear upon the directors, and in other ways. So long as the company complained of secures control of the corporation, and uses it for its own selfish interests, it is held to be a trustee for the minority stockholders, and must account for profits improperly made, to the prejudice of the minority.

A leading case on this point is *Farmers' Loan & Trust Company v. New York & Northern Railway Co.*, 150 N. Y. 410.

It was there held that the New York Central, because of its control of officers and directors of the New York & Northern, assumed the same trust relations toward the minority stockholders of the controlled corporation that a corporation itself usually bears to its stockholders.

The New York Central was not a stockholder of record in the New York & Northern. The stock and bonds through which it exercised its control over the New York & Northern were held by Drexel, Morgan & Company, who were the stockholders of record, and they held the stock as banker and agent for the New York Central, and voted it as directed by the New York Central management.

The main point that the court had first to decide in that case was, whether or not the New York Central actually exercised control over the Northern Road, and when it determined this question in the affirmative, it held that the New York Central occupied the position of trustee for the minority stockholders of the New York & Northern.

To the same effect, see:

Flynn v. Brooklyn City Ry. Co., 158 N. Y. 493.

There, the court held that the important point to determine was the control of the directors by the corporation complained of.

Hyams v. Calumet & Hecla Mining Co., 221 Fed. 529, and *Turner v. Calumet & Hecla Mining Co.*, 187 Mich. 238, are cases brought by different sets of minority stockholders of the Osceola Mining Company against the Calumet & Hecla Mining Company. The Circuit Court of Appeals and the Supreme Court of Michigan both arrived at the same conclusion at about the same time, and held that the Calumet & Hecla Mining Company occupied a fiduciary relationship towards the minority stockholders of the Osceola Mining Company, and forbade its carrying out a sale of the Osceola Company to the Calumet & Hecla Company, effected through the control by the Calumet Company of the Osceola Company's board of directors, as it was clearly more beneficial to the Calumet & Hecla Company than to the Osceola Company.

In these cases, the Calumet & Hecla Company did not own a majority of the stock of the Osceola Company, but it succeeded in obtaining control of the board of directors of the Osceola Company,

partly through proxies obtained from stockholders of the Osceola Company. The method of control, however, was held entirely immaterial in both cases, and the important point, the courts held, was to determine whether or not the Calumet Company actually controlled the board of directors of the Osceola Company, and through its exercise of this control, obtained an unfair advantage over the minority stockholders of the Osceola Company. The headnote in the Federal case is as follows:

"Independently of statute, one in *control* of a majority of the stock and of the board of directors of a corporation occupies a fiduciary relation towards the minority stockholders, and is charged with the duty of exercising a high degree of good faith, care, and diligence for the protection of their interests, and every act in his own interest to the detriment of the holders of minority stock is a breach of duty and of trust, which entitles a minority stockholder to plenary relief in equity." (Italics ours.)

The court (at page 537) said:

"On the other hand, the rule, independently of state or national anti-trust statutes, is fundamental that one in *control* of a majority of the stock and of the board of directors of a corporation occupies a fiduciary relation towards the minority stockholders, and is charged with the duty of exercising a high degree of good faith, care, and diligence for the protection of such minority interests. Every act in its own interest to the detriment of the holders of minority stock becomes a breach of duty and of trust, and entitles to plenary relief from a court of equity. *Jackson v. Ludeling*, 88 U. S. (21 Wall.) 616, 624, 625, 22 L. Ed. 492; *Jones v. Electric Co.* (C.

C. A. 8), 144 Fed. at page 771, 75 C. C. A. 631; *Wheeler v. Abilene, etc., Bldg. Co.* (C. C. A. 8) 159 Fed. 391, 394, 395, 89 C. C. A. 477, 16 L. R. A. (N. S.) 892, 14 Ann. Cas. 917; 3 Clark & Marshall on Corporations, at page 2289." (Italics ours.)

In the Michigan case, the court said at page 243:

"The fact that the Calumet & Hecla does not hold a majority of the stock of the Osceola Company is of no significance. The significant thing is that the holding it has and its use of the same has given it control of the Osceola. The result would be the same if the Calumet & Hecla held less stock and could induce other stockholders to join with it in voting to surrender the corporation and its destiny, through its control and management, into the hands of the Calumet & Hecla. Some rights of stockholders are inviolable and beyond the mere will of the majority, and come to the stockholders by law and not through the grace of their fellow stockholders, and, so coming, they abide beyond the will of any majority"

In *Steinfeld, et al. v. Neilson*, 12 Ariz. 381, the court said at page 402:

"Steinfeld was neither an officer nor a director of the corporation, yet, as found by the court, he dominated and controlled its affairs through the board of directors"

And the court held that, because of his actual control of the company, although he was not a stockholder nor a director nor officer, he nevertheless held "such a relation to the corporation and to the stockholders as does an officer or director having such management and control, and

that therefore he occupied such a fiduciary relationship to the company and the stockholders of the company as he would have sustained, had he been such officer or director" (p. 402).

The court said in *Chicago, etc., Ry. Co. v. Minneapolis, etc., Association*, 247 U. S. 490, at page 501:

"While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. *United States v. Lehigh Valley R. Co.*, 220 U. S. 257, 273, 55 L. Ed. 458, 463, 31 Sup. Ct. Rep. 387, and *U. S. vs. Delaware L. & W. R. Co.*, 238 U. S. 516, 59 L. Ed. 1438, 35 Sup. Ct. 873. In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

In *Jones v. Missouri-Edison Electric Co.*, 199 Fed. 64, the relief granted was very similar to that at bar. The control objected to by the minority stockholders resulting in the fraud complained of, was exercised through stock held in a subsidiary company.

In the *United Shoe Machinery case*, recently before this court, the court below (234 Fed. 127, at page 143) held that the United Shoe Machinery Corporation of New Jersey could be held liable

not only for the acts of the United Shoe Machinery Company of New Jersey, which it controlled, but also for the acts of the United Shoe Company of Maine, in which it did not own a share of stock, but which it dominated through its control of the United Shoe Machinery Company of New Jersey; the court saying at page 143:

“The acts of one are the acts of all these corporations; in fact, it may truthfully be said that they are the acts of the United Shoe Machinery Corporation.”

To the same effect:

Buie v. C. R. I. & P. Ry. Co., 95 Tex. 51.
Penn. Ry. Co. v. Anoka Bank, 108 Fed. 484-486.

2 *Thompson on Corporations*, Second Ed. §1233.

4 *Thompson on Corporations*, 2nd Ed. §4504.

Goodin v. Cincinnati, &c., Canal Co., 18 Ohio St. Rep. 169.

Southern Pacific Terminal Co. v. Interstate Commerce Co., 219 U. S. 498, at 523.

Globe Woolen Co. v. Utica Electric Light Co., 224 N. Y. 483 (Advance Sheets No. 940, Jan., 1919).

United States v. D. L. & W. Ry. Co., 238 U. S. 516, at p. 528.

United States v. Union Pac. Ry., 226 U. S. 61.

Chicago Mill & Lumber Co. v. Boatmen's Bank, 234 Fed. 41.

Westinghouse Electric Co. v. Allis Chalmers Co., 176 Fed. 362.

From the foregoing authorities, it is clear that the defendant can be held as trustee of the minority stockholders under the well-recognized rule that, dominating stockholders or directors and officers of a corporation occupy a relation of trust to the stockholders of the corporation, and will not be allowed to make a personal profit from the management of the affairs of the corporation, to the prejudice of the remaining stockholders; and that, where advantage is taken of control of the corporation either by the officers or directors or stockholders, a court of equity will not allow the guilty parties to profit at the expense of the minority stockholders.

This brings the case within the long line of authorities set forth in Point VI. of this brief.

II.

The defendant, through its control of the Railway Company, manipulated its affairs to bring about a foreclosure of its mortgages under the reorganization agreement in which it waived the Railway's defenses to the foreclosure suits, and acquired the entire capital stock of the reorganized company.

The Railway Company was prosperous until a few years after the Morgan Company obtained control of it in 1877. It paid no dividends after 1878. It began to show deficits after 1881, at which time the stock was selling at par, then it gradually declined to a dollar a share, at the time of the foreclosure (Gernsheim record, p. 280).

Through excessive expenditures for betterments, "extraordinary repairs and additions"

and in other ways (*id.* p. 221), the Southern Pacific interests got the Railway Company into the position where, in January, 1885, it was enabled to default in the payment of the coupons on some of its bonds. Thereafter, in February, the Southern Development Company, which "for all practical purposes was the same as the Defendant" (Defendant's "Additional Brief," p. 24), filed a bill against the Railway Company, on behalf of itself and the Morgan Company and Lackawanna Steel Company and other floating debt creditors, alleging this default in the payment of coupons, and without any notice to the trustees of the mortgages, obtained the appointment of receivers of the Railway Company. The Railway Company not only did not oppose this application, but joined in the request of the Southern Development Company for the appointment of receivers, saying in its answer:

"In view of all these facts, defendant cannot deny, but, in fact, believes it will be to the best interests of all its creditors that this court take charge of all its property" (Carey record, p. 910).

As the Railway made no defenses, the trustees of the different mortgages appeared and demurred to the Southern Development Company's bill. These demurrers were sustained, and the suit dismissed in May, 1886 (Record, p. 267), thus establishing the fact that the Railway Company did have good defenses to this suit but was not allowed to set them up by defendant.

As we have already stated, soon after the trustees of the mortgages had notice of the floating debt creditors' suit and the receivership, they filed bills to foreclose their mortgages, alleging

that the Southern Development suit was collusive; that the Railway was run in the interest of the Morgan and Southern Development Companies, and not for the benefit of the Railway (Opinion of Judge Chatfield, p. 267 of Record).

As none of the mortgages provided for foreclosure on non-payment of interest, there was no intention to bring foreclosure suits until the Southern Pacific interests attempted to get control of the Railway through this floating debt creditors' suit. Thereupon, to protect themselves, the trustees of the different mortgages filed their bills for foreclosure, alleging this collusive action between the floating debt creditors and the Railway Company.

Mr. Davenport, attorney for Easton and Rintoul, trustees of the main line mortgage, testified that he had no intention of bringing foreclosure suits until the receivership in the Southern Development suit (p. 659 of the Carey record).

The allegations in the foreclosure bills filed by the different trustees were practically the same, respecting the reason why a court of equity should grant a decree of foreclosure, although the mortgage did not provide for the maturity of the principal, on default in interest.

These bills alleged that a majority of the stock of the Railway Company was owned by the Morgan Company, the majority of which stock, in turn, was owned by the Southern Development Company; and that the Southern Development Company (really the Defendant—Defendant's "Additional Brief" p. 24), by reason of its control of the Morgan Company, controlled the Railway Company, and elected its officers and directors, including A. C. Hutchinson, who was

president of both the Morgan Company and the Railway Company (Carey record, p. 190). The said Hutchinson was at that time general manager of the Atlantic System of the defendant, and director and officer of several of the defendant's other subsidiary companies (MacArdell record, p. 234). They alleged that the trustees for the mortgages were not notified of the filing of the Southern Development Company's bill and application for receivers (Carey record, p. 191) and that it was the design of the Railway Company, controlled as aforesaid by the Southern Development Company, to keep the property of the Railway Company in litigation and in the hands of receivers, and to prevent the payment of interest on the bonds for an indefinite period, and to compel the bondholders to sacrifice their interests (*id.* p. 195).

These different foreclosure suits were consolidated into cause No. 198, and the receivers appointed in the Southern Development Company suit were discharged and the suit dismissed, and receivers were appointed in cause No. 198 to take charge of the Railway for the mortgage trustees, in May, 1886.

During all this period, and up to the time of the foreclosure, all but one of *the directors and officers of the Railway were officers and directors of the defendant, or of its subsidiary companies* (*id.* pp. 173, 174).

As defendant was thwarted in its scheme to obtain control of the Railway through its floating debt creditors, it now planned to acquire it by a reorganization, through a compromise with the bondholders, by which all other stockholders would be eliminated. Therefore, to bring the

bondholders to terms, it caused the Railway to answer the bills in foreclosure, setting up all available defenses, such as the fact that the maturity of the principal could not be advanced by default in interest, and that even after the principal became due, the enormous land grants received from the State of Texas would first have to be sold under the terms of the mortgages, and that the income from its earnings and sale of its lands were amply sufficient to take care of its indebtedness. These were "valid and legal defenses", and invulnerable (Record, p. 13).

The land grants were worth approximately \$15,000,000 (*id.* p. 5).

They caused a deadlock for a year after the foreclosure bills were filed. During this period negotiations were going on between Mr. Tweed, who was Collis P. Huntington's personal attorney and counsel for the Southern Pacific Company (Carey record, p. 623) and Mr. Huntington himself and the attorneys and officers for the Trust Companies who were trustees under the different mortgages, in an attempt to compromise the litigation (Carey record, p. 174).

These conferences resulted finally in the reorganization agreement, which was signed and dated December 20, 1887 (Record, fol. 80). This reorganization agreement had eight parties to it. The first six were the trustees of the different mortgages; the party of the seventh part was the defendant, Southern Pacific Company, and the party of the eighth part, the Central Trust Company. The Central Trust Company had no interest other than to see that the terms of the agreement were carried out, so that there were really two parties to the agreement—the bond-

holders on the one side, and the Southern Pacific Company on the other. The Railway Company was not a party of record to the agreement, but it was understood that it was represented by the Huntington interests, and that the defendant would undertake that the terms of the agreement were carried out by it.

The minority stockholders were not only not represented in the negotiations leading up to the reorganization agreement, but they had no knowledge of its terms until after the foreclosure (Opinion of Judge Chatfield, Record, page 273.)

Under the terms of the reorganization agreement, the bondholders were to exchange bonds of the old Company for bonds of like amount in the new company, but with the interest rate lowered. They were to forgive some of the past due coupons, and postpone the payment of others. The Southern Pacific Company undertook to guarantee the payment of these coupons and it also furnished \$2,600,000 for the payment of some of the coupons and expenses of the foreclosure and reorganization.

In order to carry out the reorganization, there had to be a decree of foreclosure and sale, and it was provided in the agreement that *all the mortgages were "to be foreclosed, and a new company organized, which shall acquire all the property and franchises of the present Railway Company"* (Record, fol. 84, p. 28). The Trust Company was given power to foreclose the mortgages (*id.* p. 42, fol. 125) *"and shall have and is hereby given power and authority, in its option, to declare the principal of the bonds deposited hereunder to be due."*

This reorganization agreement was filed in the

consolidated foreclosure suit May 3, 1888. The *next day*, May 4, 1888, the case was submitted to the court and the decree of foreclosure signed and filed.

Cross bills were filed to foreclose the mortgages, not already under foreclosure, on May 1st, and on May 2nd *the Railway filed its answers, admitting the allegations of the bills*, thus waiving the defenses that it had set up when the first foreclosure suits were filed prior to the signing of the reorganization agreement.

A mere recital of these facts, without the evidence of the attorneys for the various parties, shows that a decree of foreclosure could not have been granted, unless the Railway Company had waived its defenses and the reorganization agreement filed in the case, thereby informing the court that the interests of all the parties had been reconciled, and that a reorganization was going to take place upon the sale of the property.

This, in substance, is alleged in the complaint and found to be true in the final decree, and the trial Judge, in his opinion, says at page 269 of the Record:

“The reorganization agreement provided that all existing mortgages were to be foreclosed and a new company organized to take over all the property and franchises of the Railway Company. The defenses interposed were not to be relied upon, and the Central Trust Company was to act as purchasing trustee, with power, in its option, to declare the principal of its bonds deposited under the reorganization agreement to be due, and to assist in the prosecution of or to become a party to any suit then pending or which might thereafter be brought.”

And, at page 270:

"The consent of the Railway Company to declare the principal due of the bonds which might be deposited was given by the Southern Pacific Company, controlling a majority of the stock of the Railway Company, and consent was likewise given in the reorganization agreement to the Central Trust Company to form a new corporation, to which was to be conveyed all the property purchased by the Central Trust Company as trustee."

And, at page 273:

"It is evident from the record that no notice was given to or had by the minority stockholders of the proposed plan of reorganization, until the litigation had been disposed of by what was, in effect, a consent decree or submission of facts for the entry of a decree, if approved by the court; and but one day intervened after the various foreclosure suits were gotten in condition for hearing and before a decree of foreclosure and sale in the consolidated action was entered upon the consent of the majority stockholders of the Houston & Texas Central Railway Company, and of all the various parties represented by the corporations and the bondholders as a class." (Italics ours.)

In the negotiations leading up to the reorganization agreement, there was no one to look after the interests of the Railway Company. The negotiations on behalf of the Railway Company were carried on by Mr. Tweed, who was attorney for the Southern Pacific Company, and Mr. Huntington's personal counsel, and by Mr. Huntington himself, who were, of course, working in the interest of the defendant (Gernsheim record, p. 224).

The reorganization agreement was drawn up by Mr. Tweed (*id.* p. 300).

Charles Robinson Smith, chairman of the General Mortgage Bondholders' Committee, said at page 212 of the Gernsheim record:

"I also attended numerous meetings with Charles H. Tweed, who was counsel for the Southern Pacific Company and also counsel for the Houston & Texas Central Railway Company, and had numerous interviews with him."

III.

There could have been no foreclosure of the mortgages, were it not for the consent of the Southern Pacific Company, acting on behalf of the Railway Company, and waiving valid, legal defenses.

The trial court found that the defenses which had been interposed on behalf of the Railway Company "were valid, legal defenses to the said suits, and each and all of them, and could not be overcome save by the consent of the said Railway Company" and that these defenses "were never overcome in said litigations" (see complaint, par. 21, Record pp. 12, 13; decree par. 1, p. 439).

None of the mortgages provided for the maturity of the principal on non-payment of interest, and they all provided that, even when principal was due, the valuable land grants of the Railway should first be sold (*id.* p. 269).

Defendant lays great stress in its "additional" brief, pages 2 and 3, upon the fact that the principal of the *Income and Indemnity mortgage* for one

million and a half had matured and was therefore past due.

This mortgage, although still of record, was not really outstanding, as its bonds had all been *exchanged* for general mortgage bonds, except one five hundred dollar bond, which had been lost (Carey record, p. 175). For this reason, the trustees of the general mortgage had not canceled it of record.

In 1881, a general mortgage was made by the Railway to refund certain of its then existing mortgages, and floating debt (MacArdell record, p. 455). It provided that "so much and such amount of the said bonds as may be required for that purpose, *be set apart and appropriated to the payment of the following outstanding indebtedness* (p. 456) \$1,500,000 *of the income and indemnity seven per cent mortgage bonds*" (p. 457); and at page 467, it was further provided that the sum of \$16,800,000. of the bonds should be reserved by the trustee "and shall not be issued except for the purpose of *exchanging and retiring* the bonds now outstanding, issued by the said Railway Company, as hereinafter provided and specified as follows: *Income and indemnity bonds, dated May 7, 1877, payable May 1, 1887, \$1,500,000.*" and at page 469, it is provided "*that when these bonds are exchanged* for the general mortgage bonds, they shall not be canceled, but held by the trustee until such time as the trustee herein named *has the entire amount of bonds* purporting to be secured under any one of the before-cited several mortgages, when and whereupon, at the request of the board of directors of the said Railway Company, *they shall surrender* the said prior lien bonds to the said Railway Company, who shall

thereupon procure or cause to be satisfied and canceled the mortgages given to secure the payment of the said bonds."

The stipulation in the Carey record, at page 175, states that the Railway Company executed the following mortgages: "A mortgage known as the Income and Indemnity Mortgage, dated May 7, 1877, to secure a series of Income and Indemnity Bonds, which with the exception of *one bond* for five hundred dollars, the holder of which is unknown and who never has presented said bond for payment, exchange or retirement, were *exchanged* for General Mortgage Bonds, under provisions of the General Mortgage, executed on the 1st day of April, 1881, hereafter referred to and described."

The master in the foreclosure proceedings found that there was no litigation attending the foreclosure of this mortgage. "The bill was filed but *three days before final decree*, and after the terms of that decree had been substantially agreed upon after all antagonistic interests were reconciled, and after the elements of the final decree were determined * * * I find that the decree of May 4, 1888, as rendered, was the result of this agreement." (P. 1240 of MacArdell record.)

The trial court said (Record, p. 269):

"All of the mortgages referred to (except the Income and Indemnity mortgage) had still some years to run, and none of these (except the Income and Indemnity mortgage) contained a provision for the foreclosure and sale of the Road, except for the non-payment of the principal of the mortgage. The Income and Indemnity bonds had previously been exchanged for general mortgage bonds."

None of these mortgages could have been foreclosed for the existing defaults if the defenses had been urged.

Chicago &c. Co. *vs.* Fosdick, 106 U. S. 47.

The trial Judge said in his opinion (*id.* p. 273):

"The reorganization agreement was prepared under the direction and apparently after much negotiations of the attorneys for the Southern Pacific Company's directors and officers with the representatives of the bondholders. The rights of the stockholders of the Southern Development Company, of the Morgan Company and of the Houston & Texas Central Railway Company were all supposedly taken care of by those who were interested in securing a reorganization from the standpoint of the Southern Pacific Co. or the bondholders * * *

"It is evident from the record that no notice was given to or had by the minority stockholders of the proposed plan of the reorganization until the litigation had been disposed of by what was, in effect, a consent decree or submission of facts for the entry of a decree, if approved by the court; and but one day intervened after the various foreclosure suits were gotten in condition for hearing and before a decree of foreclosure and sale in the consolidated action was entered upon the consent of the majority stockholders of the Houston & Texas Central Railway Company, and of all the various parties representing the corporations and the bondholders as a class."

The Railway's answer to the cross bills of foreclosure (Carey record, p. 469) is half a page in length, and *admits all the material allegations of the bill.*

The answer of the Farmers' Loan & Trust Com-

pany to the cross bill of Easton and Rintoul (*id.* p. 468) consists of only a few lines, and concludes as follows: "For answer to the same, says that it is willing to admit and does admit, *for the purposes of this cause*, that the allegations of said cross bill are true."

The attorneys of the Trust Company were more careful than the Railway Company to have it appear that their answer was merely filed in accordance with the reorganization agreement, and that its admissions could not be used except in that suit.

The other cross bills and answers filed, waiving defenses, are set forth in the Carey record, beginning at page 421. These were all filed one and two days before the entry of the decree. The same attorneys appearing for the Railway Company represented the Morgan Company, Southern Development Company and the Lackawanna Steel Company (MacArdell record, p. 1175).

The master in the Carey case found "that the decree of May 4, 1888, as rendered, was the result of this agreement" (Carey record, p. 1010). The reorganization agreement was filed in the suit when the case was submitted the day that the decree was signed, and was prepared principally by Mr. Tweed, who was the attorney for Mr. Huntington and the Southern Pacific Company (Gernsheim record, p. 300).

The reorganization agreement, provided that all the mortgages should be foreclosed (Record, p. 28) and gave the Trust company power to declare due the principal of the various mortgages (*id.* p. 42).

IV.

No testimony was offered or submitted in securing the foreclosure decree on behalf of the Railway Company, other than depositions containing the formal proof of the mortgages, default in payment of interest, and demand on trustees to foreclose.

At page 9 of defendant's main brief is a statement that issue was raised by the answer in the foreclosure suit, necessitating the taking of a large amount of testimony in Texas, New York and elsewhere, and that this was not completed until the spring of 1888 (referring to the MacArdell record, pp. 281, 670, 754, 780, 1085, and 1159-1201). This is an obvious mis-statement, as will appear by reference to these pages.

On page 281 referred to by counsel, is simply the *bill of complaint* on the main line mortgage, and annexed to it as an exhibit is the mortgage itself.

Page 670 is the *bill of complaint* to foreclose the Western Division mortgage, with the mortgage annexed as an exhibit.

Page 780 is the *bill of complaint* to foreclose the general mortgage, with that mortgage annexed as an exhibit.

Page 1035 is the *decree* sustaining the demurrer of the mortgage trustees to the Southern Development Company's suit, and the dismissal of the bill.

Pages 1159-1201 contain only the following formal proof:

At page 1159, through Mr. Ralston, the president of the Farmers' Loan & Trust Company, the consolidated mortgage covering the Waco & Northwestern Division, was placed in evidence, and sev-

eral pages were taken up with *certificates* of the various *County Clerks*, showing that it had been filed in all the counties through which the railroad passed.

At page 1160, this same proof was introduced, concerning the *general mortgage*, and the general mortgage was introduced in evidence.

At page 1162, the same proof was introduced, concerning the *consolidated mortgage*, and the mortgage was introduced in evidence.

At page 1166, the same proof was introduced in regard to the *Waco & Northwestern mortgage*, and the mortgage was introduced in evidence.

At page 1168, is introduced the *request* received by the Trust Company, *to foreclose* the general mortgage because of default in the payment of interest.

This deposition of Mr. Ralston's was taken the end of January and the beginning of February, 1888, and was filed May 3, 1888, the day before the foreclosure decree was signed, when the case was submitted to the court.

The *reorganization agreement* had already been signed by all the parties agreeing to the foreclosure, on December 30, 1887.

On page 1175, is the evidence taken on the 13th day of February, the same attorneys appearing for the old Railway Company, and for the Morgan Company, the Southern Development Company and the Lackawanna Steel Company. Then follows the examination of several witnesses to prove the *amount of default coupons* under the mortgage, of which Easton and Rintoul were trustees, and the *demands* of the different committees of bondholders *to have the mortgage foreclosed* for default in the payment of interest.

This evidence was taken in February, 1888, and

submitted on the 3rd day of May, 1888, the day before the entry of the decree.

This is all the so-called "large amount of testimony in Texas, New York and elsewhere" and consists only of formal proof of the defaults under these mortgages, taken in the City of New York only, and not in Texas or elsewhere, unless the certificates of the various County Clerks and proof of the filing of the different mortgages in Texas, can be considered testimony taken in Texas.

Again, at page 14, counsel states "that on May 3, 1888, the parties offered their evidence in open court, some of it having been taken on deposition prior to that date (MacArdell record, Exhibit E, Vol. II, p. 1201)."

This reference is to their offer of evidence at the trial, May 3, 1888, and consists solely of the exhibits and deposition already referred to and covered in the page references above given at page 9 of defendant's brief.

At page 21 of the defendant's main brief and other parts of both of its briefs, quotations are taken from the opinion of Judge Pardee in the Carey case, in an attempt to show that the answers of the Railway Company were not withdrawn, and that there was evidence taken in the foreclosure suit, and that in some respects the findings in the Carey case are in conflict with those in the case at bar. In the first place, the Carey case was an attempt to set aside the foreclosure decree, on the ground that it was fraudulent and void, and that there was collusion between the bondholders and the Southern Pacific Company. (Op. of Judge Chatfield, Record, p. 209). This was disproved by the evidence of the attorneys for the mortgage trustees, showing that they were acting merely for the interest of their own bond-

holders, and did not know or care whether the Southern Pacific Company was going to take care of the minority stockholders.

The court in the Carey case merely refused to set aside the decree on the ground of fraud.

The defendant claims that, because the opinion in the Carey case says there was evidence submitted at the hearings for the decree, that it could not have been a consent decree, and that the Railway therefore did not waive its defenses. Judge Pardee said in the Carey case

"the record teemed with evidence in the nature of admissions by all parties, tending to show the justice of the creditors' demands, and the fact that the Railway had no meritorious defense." (52 Fed. R., 675.)

Mr. Davenport, attorney for the mortgage trustees testified as follows:

"Q. When were these answers withdrawn, Mr. Davenport? A. I could not say; I am not sure they were withdrawn, Mr. Landale; the record will show * * *"

Q. Was any attempt made at the final hearing by counsel to urge upon the court any of the several defenses set up in the answers filed by the railway company? A. No, sir. (p. 663, Carey record.) * * *

Q. Then the entire decree was practically entered by consent of all counsel present? A. Well, yes, I should say it was, if you refer to the form of the decree and the final result.

Q. The terms and the nature of the decree. A. Yes." (*id.* p. 664.)

Q. Were any pleadings read to the court at this hearing? A. No.

Q. Was any evidence read to the court at the final hearing? A. No.

There can be no question of the correctness of the finding of the trial court that the defenses were waived. The answers to the original foreclosure suits, filed before the reorganization agreement was perfected, may not have been withdrawn, but the defenses contained in them were waived, *and the new answers that were filed to the cross bills, after the reorganization agreement had been signed, waived all defenses that the Railway had, and admitted the allegation of the bills.*

It is perhaps unnecessary for us to review the evidence at such length, in view of the two court rule, but we do so because defendant's briefs are largely devoted to a discussion of the evidence only.

V.

The Southern Pacific Company did not act as "banker", as claimed by the defendant, in bringing about the foreclosure of the mortgages, and securing the stock of the reorganized company.

The defendant struggles to impress the court with the view that the Southern Pacific Company, in the plan of reorganization, acted simply as a banker. A "banker" in a plan of reorganization of a corporation, underwrites securities, for which a small percentage or compensation is allowed him, and there is no concealment or cloak thrown over him in his capacity as banker. It is frankly declared in the instrument.

If the defendant was only acting as banker, who represented the Railway Company to "consent" to a foreclosure of the mortgages, as provided in

the agreement? The parties to the agreement were only the bondholders and the defendant (besides the Central Trust Company, acting simply as purchasing trustee). How could a reorganization agreement be effective if made only between bondholders desiring a foreclosure of the mortgages and a "banker"?

This plan of reorganization was the product of the Southern Pacific Company. That Company was the brains and moving spirit of the plan, from start to finish, commencing with the Southern Development suit, and ending—after tying up the mortgage trustees by the answers in the foreclosure suits—with a compromise which assured to the Southern Pacific the ownership of all the stock of the company, as reorganized. So sure was the Southern Pacific that it would get all the stock, that it guaranteed the interest upon debentures, without any return to it for that guaranty, except the provision under which all the stock of the new company would eventually fall into its lap.

Unless it had been absolutely certain that no creditor or stockholder would pay the prohibitive assessment of 71% on stock of a road which for years had been in the hands of receivers, the Southern Pacific Company would not have guaranteed interest upon the new debentures. The plan was drawn with the view—amounting practically to an assured fact—that all the stock would reach the coffers of the Southern Pacific Company.

Mr. Huntington testified in the Gernsheim case at page 302 of the Gernsheim record that the Southern Pacific wanted the Railway as part of its system. The evidence is as follows:

"Q. But, pray tell me, Mr. Huntington, why the Southern Pacific, in your judgment, should have guaranteed the interest? A. They operated those roads.

Q. Ah, they operated those roads? A. Yes.

Q. Then it was because it would benefit the Southern Pacific Company? A. Yes; we thought it would be well to have those properties worked in harmony each with the other.

Q. In other words, to have the Houston and Texas Central worked in harmony with the other roads that are connected with or controlled by the Southern Pacific? A. Yes, and some other roads."

"There is the motive." The defendant was attempting to get possession of this Railway to incorporate it in its transcontinental system. It first tried to do so through a creditor's action on behalf of the Southern Development and Morgan Companies, and when it was prevented by the mortgage trustees, it had to compromise with the bondholders and bring about the suit which would enable it to obtain possession, as it finally did, under the reorganization agreement.

VI.

The Southern Pacific Company, by electing the officers and directors of the Railway Company through its ownership of stock in one of its subsidiary companies, and exercising control of the Railway Company, occupied the same trust relation to the minority stockholders of the Railway Company as did its officers and directors; therefore, because of this trust relation, it should not be allowed to retain the whole of the consideration received by it in exchange for its surrender of rights and defenses of the Railway Company in the foreclosure suit.

We have shown by the findings below, unanimously affirmed by the Circuit Court of Appeals,

and conclusively supported by the evidence, that the Southern Pacific Company was, in effect, the majority stockholder, exercising control of the Railway Company some years prior to and at the time of the foreclosure (Point I *supra*); and that the directors of the Railway Company, for the four years preceding the foreclosure, were Collis P. Huntington; J. J. Atkinson; Charles Dillingham; A. H. Swanson; E. W. Gave; Charles Fowler; Isaac E. Gates; J. Schrieber (MacArdell record, p. 233), all but one of whom were officers and directors of the defendant or its subsidiary companies (Record p. 264); and that the reorganization agreement, permitting the foreclosure, was drawn up by the officers and attorneys of the Southern Pacific Company, and that it was a party to the agreement, which was afterwards carried out; that the suits for foreclosure against the Railway Company were compromised by the bondholders sealing down their claims and the Railway Company waiving its defenses to the foreclosure and that the foreclosure was entered on the consent of the Railway Company, and the reorganization agreement filed as part of the evidence upon which the decree was based (Point II *supra*).

We have also shown that no real opportunity was given the minority stockholders to participate in the reorganization. All this was found below by both courts, and is controlling under the two court rule.

We, therefore, have in effect a majority stockholder selling the corporate assets for its own exclusive benefit, and refusing to allow the minority stockholders to participate in the consideration it received.

In *Ervin v. Oregon Railway and Navigation Company*, 27 Fed. 625, at page 630, the court said:

“Plainly the defendants have assumed to exercise a power belonging to the majority, in order to secure a personal profit for themselves, without regard to the interest of the minority. They repudiate the suggestion of fraud, and plant themselves upon their right as a majority to control the corporation’s interests according to their discretion. They err if they suppose that a court of equity will tolerate a discretion which does not consult the interests of the minority.”

The Court continued at page 631:

“* * * When a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become, for all practical purposes, the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders. Although stockholders are not partners, nor strictly tenants in common, they are the beneficial joint owners of the corporate property, having an interest and power of legal control in exact proportion to their respective amounts of stock.”

And the court said at page 632:

“The majority cannot sell the assets of the company and keep the consideration but must allow the minority to have their share of any consideration which may come to them.”

And said at page 633:

“This results from the rule of equity which entitles those whose property has been misapplied by an agent or fiduciary to follow it into any form into which it has been con-

verted and impress it with a trust, whenever its identity can be traced or at their election to recover the value of the property in any form into which it has been transmuted. If it was worth much more as a constituent of the new corporation than it would have been worth otherwise, the minority stockholders are entitled to the benefit of the increase. The majority stockholders are not to be permitted to segregate it from the conditions in which they have placed it for the purpose of fixing its value for the minority."

And, at page 632:

"The fiduciary cannot retain his bargain by showing that the sale was public, or that the price was fair or that there was no intention on his part to gain an unfair advantage. Where he has a duty to perform which is inconsistent with the character of a purchaser he cannot divest himself of the equities of the beneficiaries to demand the profits that may arise from the transaction."

In *Sparrow v. Bement*, 142 Mich. 441, the Bement family were the majority stockholders controlling the corporation. A reorganization of the company was necessary. Most of the creditors agreed to scale down their debts and take bonds. The plaintiff who was a preferred stockholder understood, in a general way, that a foreclosure which took place, in pursuance to the reorganization agreement, was merely formal and that the new company which would be formed under the reorganization agreement would take care of the stockholders of the old company, and therefore did not oppose the foreclosure. When the reorganized company was formed, however, the minority stockholders were not taken care of

and the plaintiff brought suit to compel the new company to issue to him his proportion of preferred stock in the new company. The court said:

"It is conceded that the mortgage foreclosure by the trustee Bement was regular, so far as the formal requirements of the law are concerned, and that, so far as the records are concerned, the new company acquired a valid title under the commissioner's deed. But the title will not protect defendant, if it was fraudulently acquired as to complainant. *Sweet v. Converse*, 88 Mich. 1, 49 N. W. 899. 'It does not alter the fraudulent character of the arrangement that the end was accomplished through the agency of valid mortgages regularly enforced.' *Goddard v. Fishel-Schelichten Importing Co.* 9 Colo. App. 306, 49 Pac. 279; *Fishel v. Goddard*, 30 Colo. 147, 69 Pac. 607. As said in *Ervin v. Oregon R. & Nav. Co. supra*: 'Although the minority of stockholders cannot complain merely because the majority have dissolved the corporation and sold its property, they may justly complain because the majority, while occupying a fiduciary relation towards the minority have exercised their powers in a way to buy the property for themselves and exclude the minority from a fair participation in the fruits of the sale.' In *Smith v. Smith, S. & Co. supra*, it was said, conceding that it was within the power of the board of directors of the corporation to sell all of its assets in payment of its debts: 'If that be conceded, the fact remains that the Directors have no right to profit out of such sale. The testimony shows that, while all of the other stockholders lost their investments, Sturgeon & Dorr saved theirs; for they obtained without costs the same number of shares in the new corporation admittedly worth par that they had in the old, etc. * * *

The interests of the preferred

stockholders were, apparently, intended to be protected. Afterwards the Directors seem to have concluded that it was to the interest of the 'promoters' of the new company to shut them out. There was no one to oppose this interest on behalf of the preferred stockholders, since the Directors and Officers of the old company, whose duty it was to protect the interests of the preferred stockholders, were the very persons who would profit by excluding their interests.

* * * The assets of the old company which were acquired by the new company were, for use in its business, of considerably greater value than the amount of its liabilities; but it is clear that, if the property had been sold on foreclosure of the mortgages in the usual way to outsiders, it would not have paid the creditors, and complainant's stock would have been a total loss. All that complainant can justly complain of is that he has been deprived of his stock and the share of the profits which it would have brought to him.

A decree may be entered in favor of complainant for the value of 650 shares of preferred stock in the new company, as of the date of the decree in the Court below, and for such dividends as the preferred stock may have actually been paid since the formation of said new company."

In the case of *Jones v. Missouri-Edison Electric Co.*, 144 Fed. 765, at page 771, the court said:

"The fraud or breach of trust of one who occupies a fiduciary relation while in the exercise of a lawful power is as fatal in equity to the resultant act or contract as the absence of the power. The relation of a stockholder to his corporation, to its officers and to his co-stockholders is a relation of trust and confidence. The corporation holds

its property in trust for its stockholders who have a joint interest in it. The officers of the corporation, if not technical trustees for the stockholders, are such in so real a sense that any use by them of the property of the corporation for their own profit to the detriment of any of the stockholders is a breach of their trust and their duty, which is actionable in equity. The stockholders of a corporation are jointly interested in the same property and in the same title. Community of interest in a common property or title imposes a community of duty and mutual obligation to do nothing to impair the property or the title. It creates such a fiduciary relation as makes it inequitable for any of those who thus share in the common property to do anything to or with it for their own profit at the expense of others who have the same rights. *Jackson v. Ludelig*, 21 Wall. 616, 622, 22 L. Ed. 492; *Booker v. Crocker*, 132 Fed. 7, 8, 65 C. C. C. 627, 628.

A combination of the holders of a majority or of three-fifths of the stock of a corporation to elect directors, to dictate their acts and the acts of the corporation for the purpose of carrying out a predetermined plan places the holders of such stock in the shoes of the corporation and constitutes them actual, if not technical trustees for the holders of the minority of the stock. The devolution of power imposes correlative duty. The members of such a combination become in practical effect the corporation itself because they draw to themselves and use the powers of the corporation. In a sale of its property, in a consolidation of the corporation with another, in every act and contract of the corporation which they cause they make themselves the trustees and agents of the holders of the minority of the stock because it is only through them that the latter may act or contract regarding the corporate property or

preserve or protect their interests in it. Such a majority of the holders of stock owe to the minority the duty to exercise good faith, care and diligence to make the property of the corporation in their charge produce the largest possible amount, to protect the interests of the holders of the minority of the stock and to secure and deliver to them their just proportion of the income and of the proceeds of the property. Any sale of the corporate property to themselves, any disposition by them of the corporation or of its property to deprive the minority holders of their just share of it or to get gain for themselves at the expense of the holders of the minority of the stock, becomes a breach of duty and of trust which invokes plenary relief from a court of chancery" (See cases cited).

In *Farmers Loan and Trust Company v. N. Y. and N. Ry. Co.*, 150 N. Y. 410, the syllabus states the rule as follows:

"Where a majority of the stock of a corporation is owned by another corporation, and the latter assumes the control of the business and affairs of the first corporation, through its officers and directors, it assumes the same trust relation towards the minority stockholders of the controlled corporation that a corporation itself usually bears to its stockholders."

To the same effect:

Jackson v. Ludeling, 21 Wall. 616.

Menier v. Tel. Co., L. R. 9 Chanc. App. 350.

Washburn v. Breen, 133 U. S. 30.

Wardell v. U. P. R. R. Co., 103 U. S. 651.

- Mumford v. Equador Delevopment Co.*,
111 Fed. 639.
- Continental Insurance Co. v. N. Y. N. H.
& H. R. R. Co.*, 187 N. Y. 225.
- Chicago Cab Co. v. Yerkes*, 141 Ill. 320.
- Kuchler v. Green*, 163 Fed. 91.
- Trice v. Comstock*, 121 Fed. 620.
- Symmott v. Cummings*, 116 Fed. 40.
- Wheeler v. Abilene Co.*, 159 Fed. 391.
- Cutting v. Baltimore & Ohio Ry. Co.*, 35
Misc. 616; 65 A. D. 414.
- Jones v. Missouri-Edison Elec. Co.*, 199
Fed. 64.
- 2 *Cook on Corporations*, § 662.
- 2 *Thompson on Corporations*, 2nd Ed.
§ 1233.
- 4 *Thompson on Corporations*, 2nd Ed.
§§ 4504-4507.

The court's especial attention is called to the New York Court of Appeals decision in the Mac-Ardell case (189 N. Y. 368). The majority of the court held at page 376 that our complaint in that case did not "comprehend within its scope the cause of action by minority stockholders, to impress a trust upon property acquired by a majority stockholder", and for this reason the judgment of the Appellate Division, dismissing the complaint, was affirmed.

Judges Bartlett and Vann, in their dissenting opinion, held that the bill was broad enough to include the said cause of action, and they therefore held that on the evidence presented, *the plaintiffs were entitled to a decree in their favor*. These Judges of the New York Court of Appeals are the only ones who prior to this suit found the

pleadings in proper form to permit of a decision on the merits. They said in their opinion, at page 389:

"I am of opinion that on the uncontroverted facts in this record, set forth in the complaint and admitted by the answers, the learned Appellate Division erred in reaching the conclusion that, notwithstanding the decree of the United States Circuit Court for the Eastern District of Texas was not a bar to this action, there was no question of law presented for its consideration that entitled plaintiffs to judgment of reversal. This being the condition of the record, the unanimous decision of the Appellate Division has no bearing on the case.

It is unnecessary to state in detail the facts tending to show that the two reasons given by the Appellate Division for dismissing the complaint involve legal error. The plaintiff's brief is very full in this connection. It is a conceded fact that the old company was practically insolvent unless measures were taken for its relief. It is also conceded that the rights of the defendants, the mortgagees of the new company, are not involved in this litigation. The question is whether the minority stockholders are entitled to work out through the Houston Company No. 1 their claim that by the terms of the re-organization agreement the Southern Pacific Company has been permitted to appropriate the whole consideration of an agreement to which the old company was a party and by which it was entitled to certain benefits. All the stockholders of the old company were vested with equal rights.

I am of opinion that the Southern Pacific Company in consenting as a majority stockholder to the scheme of the re-organization agreement did so as the representative of the old company and all of its stockholders, and the minority stockholders are entitled to their

benefits. What that share is can only be ascertained upon an accounting with the majority stockholder.

The present position of the plaintiffs is that the Southern Pacific Company occupies the same position towards minority stockholders as did the officers and directors of the old company. This position of the Southern Pacific Company prevents it from taking any advantage of minority stockholders. Furthermore, the plaintiffs ratify and confirm the composition agreement with creditors. They admit that the judgment of the United States Circuit Court for the Eastern District of Texas is final and conclusive.

The present position of the plaintiffs is not inconsistent with the finding of the trial court that the purchasers at the foreclosure sale acquired a good title. The Southern Pacific Company, the majority stockholder of the old company, received an entire issue, \$10,000,000 stock of the new company, and plaintiffs seek after a full accounting and adjustment of mutual rights between it and them to impress a trust on the net property of the old company for the benefit of minority stockholders." (*Italics ours.*)

These views so clearly expressed by the two dissenting judges in the New York Court of Appeals in the MacArdell case were not opposed by the opinion of the majority of the court. The majority held that under the complaint in that case it could not consider the equity which the minority judges deemed to exist. That equity is now presented here and has been sustained by the courts below.

VII.

No injustice was done to the floating debt creditors.

The first and apparently the principal point of both briefs filed on behalf of the defendant, consists of a claim that, if the decree is affirmed, the result would be that the reorganization of the old Railway Company will result in restoring the property "to the bondholders and stockholders, without any payment having been made to the creditors, and the property and assets of the said Railway have been freed entirely from the claims to its creditors" (p. 2 of defendant's main brief).

This statement is put in various forms in other portions of the brief, and we have merely selected this statement for convenience.

The defendant below never made any effort to bring in any of the floating debt creditors as parties to this action, and their rights have never been asserted by them in this litigation, from its inception.

The affirmance or reversal of this decree could have no effect on the rights or interests of the floating debt creditors. If the decree is affirmed, and the stock divided, as the decree provides, the floating debt creditors will be in precisely the same position that they are in at the present time. The Southern Pacific Company may have arranged a foreclosure, as it now contends in its brief, which invaded the rights of the floating debt creditors. As to whether it did so or not, there is no evidence in this record, but if it did so, it cannot, by the greatest stretch of imagination, be claimed that the minority shareholders were parties to any such wrong on the floating debt creditors.

If the decree should be reversed, and the Southern Pacific Company left in possession of all of the stock of the new Railroad Company, the interests of the floating debt creditors would be just as completely exterminated as it is claimed they would be if the rights of the minority stockholders, which were asserted in this litigation, are enforced.

The rights of the floating debt creditors are settled by the case of *Northern Pacific Co. v. Boyd*, 228 U. S. 482.

If any wrongs were done to them, as suggested in the brief of the defendant, they may, by an appropriate litigation, have themselves reinstated as creditors of the present, solvent, affluent Railroad Company. If, as a matter of fact, their claims were practically all secured by collateral, and most of these claims practically disposed of and satisfied before the foreclosure, the question concerning them is negligible.

The supposition, that they all did have their claims properly secured, is the most natural one, as it can hardly be imagined that they would otherwise have permitted a consent to foreclose to be put through, which apparently wiped out their rights against the property of the old Railway Company.

(The claims were secured, see *post* pages 63 and 64.)

VIII.

The decree is more than fair and liberal to the Defendant, and the computations therein are not disputed.

By the decree, the plaintiffs are required, as a condition of receiving their *pro rata* share of

the stock of the reorganized company, in the possession of the defendant, to pay to defendant their *pro rata* share of all moneys expended by it in the acquisition of the stock (less the dividends received thereon), with interest (see decree, Record p. 284).

The decree is responsive to the relief prayed for (*id.* p. 26).

The general form of the decree follows the decrees in the cases of:

Cutting v. Baltimore & Ohio R. R. Co.
(*supra*).

Jones v. Missouri-Edison Co. (*supra*).

Sparrow v. Bement (*supra*).

Menier v. Telegraph Co. (*supra*).

The accuracy of the figures is not questioned. The answer admits that the defendant paid \$2,602,615. under the reorganization agreement, in order to acquire the ten million dollars par value of the stock of the new company (see answer, par. LXI, *id.* p. 120), and not an additional dollar was paid by the defendant for any purpose (answer, par. XXVII, *id.* p. 83).

In other words, the defendant paid under the agreement, for the reorganization expenses and for all other purposes, including cash payments made to bondholders, approximately \$26. a share to acquire the ten million dollars of new stock (see opinion, court below, *id.* p. 271) and the plaintiffs are required to pay the defendant \$26.026, with interest, for each share of stock of the new or reorganized company, to which they are entitled (*id.* p. 288) (see also master's report, *id.* p. 429). The defendant, therefore,

is placed in precisely the same position as though it did what, in equity, it should have done when it acquired the new stock, *i. e.*, deliver to the plaintiffs their *pro rata* share of the stock, and then receive from the plaintiffs a proportionate share of the moneys laid out by defendant. The plaintiffs' stock is received subject to any claims which are still valid and enforceable against the stockholders, either through the Houston and Texas Central Railway Company itself, or against the stockholders directly (see opinion, *id.* bottom p. 283).

Complete equity therefore is done both parties. Indeed, there might be a question whether the innocent plaintiffs should have been required to pay interest on the \$26. a share—their *pro rata* of the moneys expended by the defendant. It surely was not their fault that the defendant did not deliver them the stock to which they were entitled, and it might well have been claimed that they should not be called upon to pay legal interest from 1889; but the court below has by its decree, directed the reimbursement of the defendant for every dollar which it expended—with interest—as though it had fulfilled its duty toward the plaintiffs at the time it should have done so, *i. e.*, when it first acquired the stock.

All that plaintiffs ask is that they be given their certificates of stock still in the hands of the defendant. The defendant's answer admits that it "now holds and owns and claims to own and hold all of the ten million dollars par value of capital stock of the Railroad Company, excepting directors' qualifying shares" (see answer, par. XXVII, *id.* p. 83, fol. 248).

This is equitable, and while it is not, by any

means, the full relief to which the plaintiffs are entitled, they are satisfied, in order to end this litigation, with this simple form of decree.

IX.

The defendant owns no stock of either of the floating debt creditors, Lackawanna Coal & Iron Co. or Southern Development Company and no injustice is done the Morgan Company by the decree.

The argument made by our adversaries, and supported by Judge Hough's dissenting opinion, is, we submit, intrinsically unsound. The theory advanced is that there was some floating debt left in the hands of the Morgan Company at the time of the foreclosure, which was wiped out; that the Southern Pacific Company, owning a majority of the stock of the Morgan Company, thus suffered a loss by the wiping out of this asset of the Morgan Company; consequently, equity requires that the plaintiffs, before receiving their stock, should compensate the Southern Pacific Company for the loss which it thus suffered by the destruction of this asset of the Morgan Company.

Let us assume that the Morgan Company was a party to this action, asserting its rights, and suppose, for the sake of argument, that it had exactly such rights as the creditor was held to have had in the case of Northern Pacific Railroad Co. *v.* Boyd (*supra*); let us suppose that a decree were being framed under such conditions; the decree would undoubtedly be to reinstate the Morgan Company as a creditor of the new Railroad Company, and thus restore its status as a creditor, ahead of all

stockholders, not only the plaintiffs' but the defendant. The payment of its debt would fall, not upon individual shareholders—the plaintiffs and the defendant—but upon the corporation, the new Railroad Company.

After the debt was paid to the Morgan Company, it would inure to the benefit of all the stockholders of the Morgan Company, not the majority holder the Southern Pacific Company, alone, but all stockholders of the Morgan Company.

Let us now contrast this situation with the one proposed by the defendant: The court is asked now to compel the plaintiffs to pay a *pro rata* share of the floating debt of the Morgan Company, not to the Morgan Company, but to the Southern Pacific Company. It is asked to have this payment made, not for the benefit of all of the stockholders of the Morgan Company, but solely for the benefit of the Southern Pacific Company, the majority shareholder of the Morgan Company. The Southern Pacific Company, it is to be noted, only held 51% of the stock of the Morgan Company.

The defendant does not propose that it shall also be assessed to pay the balance of the floating debt due from the old Company to the Morgan Company, but proposes to leave unpaid its *pro rata* share of that debt. It proposes, in short, that the minority shareholders of the Morgan Company shall get nothing from the plaintiffs, or anybody else; that it shall take its stock in the new company, without doing anything for the Morgan Company; that the interest, whatever it may have been, that it had in the floating debt of the Morgan Company, shall be in some way computed; and that it shall be paid by the plaintiffs

as a condition for righting a wrong done to them by the defendant.

A full statement of the proposition seems to carry with it its refutation.

Whatever rights the Morgan Company has against the new Railroad Company, may be asserted by it—not the defendant—and plaintiffs will take their stock subject to such rights.

No attempt was made anywhere in this case to show that *the Southern Pacific Company* had suffered one cent of loss by reason of the non-payment of these default judgments entered against the old company after the foreclosure sale, and after it had gone out of existence. As a matter of fact, the *Southern Pacific Company* does not own a share of stock in either the *Lackawanna Steel Company* or the *Southern Development Company*. The *Southern Development Company* was one of *Huntington's* companies, and he owned about one-quarter of its stock and he also owned one-quarter of the *Southern Pacific Company's* stock. He controlled both companies (Carey record, p. 172, fol. 348), but the *Southern Pacific Company* does not own any stock in the *Southern Development Company* or the *Lackawanna Steel Company* (*Southern Pacific Company* report Ex. II, p. 46, and Carey record, p. 172, and MacArdell record, page 231).

In defendant's main brief, wherever the amount of indebtedness of the Railway is spoken of, the gross debt of the floating debt creditors, the Morgan Company, the Southern Development Company and the Lackawanna Steel Company is always referred to *without any allowance being made for the collateral held by those companies which, in the case of the Morgan Company, the record shows reduced its alleged indebtedness of*

\$1,616,314. (Record, p. 133) to \$177,598. This is arrived at by deducting from said gross amount the \$558,716. of credits in Exhibit C, annexed to the answer (*id.*, p. 133) and the \$880,000. of bonds held as collateral security by the Morgan Company. (Op. Circuit Court of Ap., *id.*, p. 488.)

The Southern Development Company and the Lackawanna Steel Company also held collateral very nearly equal to the amount of their indebtedness (*id.*, p. 131).

These claims were not reduced to judgment until *May, 1889, the year following the foreclosure and sale of the Railway Company, at a time when the Railway was defunct and had no property.*

It is stipulated at page 69 of the Lawrence record, Exhibit F, that *since the foreclosure in 1888, the Railway company has held no officers' or directors' meetings, and has had no property and transacted no business.* The *mala fides* of these judgments is shown by the fact that they were entered for the full gross amount of the claims, without any allowance for the credits conceded to be due the Railway Company, as shown in the Exhibits attached to the answer at pages 131 and 133 of the record, or for the allowance of the \$880,000. of bonds of the new company given to the Morgan Company in satisfaction and acquittance of its claim to the extent of the face value of the bonds (Record, fol. 151).

It is also significant that until the foreclosure took place, while some of the acts of the Railway Company were being watched and scrutinized by the trustees of the mortgages, the Morgan Company, Southern Development Company and Lackawanna Steel Company were unable to enter any

judgments against the Railway Company for their claims.

The appellant pleads no set-off or counterclaim on account of the debt of this company, and *no such claim was made during the trial*. The first appearance in the record of any such claim is the defendant's exception to the master's report (Record p. 435).

No evidence was offered to show that defendant had paid any money, relinquished any right, or suffered any loss by reason of this debt.

There was no attempt made to prove what, if anything, this claim of the Morgan Company was worth, and if it had any value no attempt was made to show that it formed any part of the consideration for the acquisition of the stock of the Railroad Company in litigation on this appeal. No claim on this subject is made in the answer. The whole thing was clearly an afterthought, with no facts in the record upon which to base it.

The defendant's answer has annexed to it a list of the moneys loaned by the Morgan Company and the credits (Record p. 133), which shows \$1,616,314, debits, and \$558,716. credits, leaving a balance of \$1,057,598. *The Morgan Company held \$880,000. bonds of the Railway Co. as collateral security for this indebtedness (fol 1472, p. 488 of record).*

So that after deducting the credits and \$880,000 of bonds received by the Morgan Company, its claim amounts to no more than \$177,598. The defendant owned 51% of the stock of the Morgan Company and would be entitled in no event to more than one-half of \$177,598 on the assumption of a valid claim of the Morgan Company worth its face amount.

The record is in such shape that even if the defendant had pleaded this as a set-off, there is nothing upon which it can be based, as there is not only no evidence in the record, but no offer of evidence was made by the defendant to show that it was in any way entitled to this credit of one-half of the \$177,598. Of this \$177,598. the present shareholders could only be charged—if the claim were paid in full—their proportionate share, which would be insignificant.

The court below said on this point:

“The defendant, therefore, urges that if the plaintiffs coming into equity, seek to impress a trust upon the property in the hands of the defendant, they must reinstate the obligations of the general creditors, must recognize the claims of those obligations against any property of the corporation, which would in the hands of the corporation give value to the shares of stock.” (Record p. 281.)

And, at page 282:

“Under the defendant’s theory it is urged that the lands of the Houston and Texas Central Railway Co. were not then marketable, and that the outstanding indebtedness, other than that secured by the mortgages, could not therefore be paid by that means. They thus ask to show that no surplus or equity was shown to exist, which would be available for general creditors, and that from this standpoint the foreclosure suit could not be held to be collusive or fraudulent.

The plaintiffs agree in this proposition and say that for this reason the rights given up by the general creditors were of no value, and that if the majority stockholders of the Railway Company, through the action of the Southern Pacific Co., could wipe out the un-

secured debts, the Southern Pacific Co. should not be allowed to insist upon the validity of the foreclosure action, in so far as it cut off or destroyed the claims of those creditors against the property bought in by the Southern Pacific Co., and then to insist that these claims were not wiped out or cut off by reason of the fact that the Southern Pacific Co. obtained by purchase the property for itself.

It must be held that the defendant has, for the purposes of the present action, obtained the property free from any lien or claims of the general creditors. The plaintiffs did not have an opportunity to prevent the action of the majority stockholders, in thus acquiring the property of the Railway Company, and that the Southern Pacific Co. acquired this property subject to any equitable rights which the minority stockholders might have therein. Such cases as *Ervin v. Oregon Ry. Co. and Nav. Co.*, 27 Fed. 625; *Farmers' Loan and Trust Co., v. N. Y. and N. R. Co.*, 150 N. Y. 410; *Sparrow v. Bement*, 142 Mich. 441; *Backus v. Brooks*, 195 Fed. 452; *Cook on Corp.*, sec. 662, and cases cited; *Synnott v. Cummings*, 116 Fed. 40, sufficiently establish the proposition that the minority stockholders had rights which they could enforce against the property in the hands of the majority stockholders. In enforcing these rights, they can insist upon an accounting and division of their property in equity, leaving the property, that is, the shares of stock in their hands, subject to any claims which are still valid and enforceable against the stockholders, either through the Houston and Texas Central Railway Co. itself, or against the stockholders directly.

This is the relief asked in the present action and to which the plaintiffs would seem to be entitled."

Either the Morgan Company has been properly cut off by the decree or it has not. If it still has a valid, enforceable claim against the new Railroad Company, which it has not lost by laches or other tenable defense, it will not be precluded from proceeding against the property sold under the decree.

The Railroad Company is concededly a solvent company, paying dividends, with over \$18,000,000. balance (*id.* p. 242) and assets of over \$42,000,000. (*id.* p. 243). If the Morgan Company sustains its claim that it is not estopped or precluded by the decree, its claim will then be enforced against the new Railroad Company, and the minority stockholders, as well as the Southern Pacific Company, will hold their stock subject to the payment of this claim by the Railroad Company; but certain it is that the Morgan Company never had a claim against the minority stockholders individually, and the minority stockholders cannot be asked now to pay their *pro rata* share of any claim against an alleged creditor of the old Railway Company.

In *Cutting v. Baltimore & Ohio Railroad Co.*, 65 A. D. 414, relied on by defendant, the Staten Island Company had guaranteed the Baltimore & Ohio Company for all losses the latter might suffer by reason of its second mortgage bonds of the Staten Island Company. The Staten Island Company was unable to pay the interest on the second mortgage bonds so guaranteed by the Baltimore & Ohio, and a reorganization plan was entered into, in which certain bankers (Hallgarten & Company) were trustees. *This reorganization agreement provided* that after entry of the decree and prior to the foreclosure sale, the Bal-

timore & Ohio Railroad should pay the second mortgage bondholders who were bringing the foreclosure suit, the reorganization expenses, trustees' compensation, etc. (see reorganization agreement set forth in complaint in *Redfield v. Baltimore & Ohio R. R.*, vol. 2145, N. Y. Court of Appeals records).

The Baltimore & Ohio surrendered no defenses which the Staten Island Company had—as did the Southern Pacific Company in the case at bar—and the minority stockholders were permitted to come in, provided they complied with the terms of the reorganization agreement and paid what was stipulated under that agreement should be paid.

The "open account" was that of the Baltimore & Ohio Railroad against the Staten Island Company. The Southern Pacific Company has no claim against the old Railway Company on open account, and never did have, and in the reorganization agreement, there was no provision made that the Morgan Company should forgive its claim against the Railway Company. No mention is made of the Morgan Company in that agreement, excepting that provision is made for all floating debt creditors, and as we have stated above, the Morgan Company, as a floating debt creditor, has such rights as the reorganization agreement has provided for all floating debt creditors, which right, if not barred by decree, laches or other defenses, may be enforced against the Railroad Company, but surely, is not a claim against the minority stockholders.

X.

The so-called French loan will, in no way, embarrass compliance with the decree.

In the defendant's briefs, much space is devoted to the alleged hardship in complying with the terms of the decree because of the hypothecation of the stock in the so-called French loan.

The contention, in the light of all the facts, is most remarkable. The French loan was effected during the pendency of the litigation commenced by Mr. Lawrence, which preceded the present suit.

In the French loan mortgage it is provided that this stock should be valued at fifty dollars a share, and that it could be replaced by substituting five million dollars worth of other securities. It is practically the work of a clerk to send other securities around to the United States Trust Company, and withdraw the stock of the Houston & Texas Central Railway Company.

In the annual report of the Southern Pacific Company for 1913 (Exhibit 11, pp. 46 and 47), it appears that the Southern Pacific Company has unpledged some *two hundred and seventy-two million of stock, and over fifty-two million dollars worth of bonds.*

The French loan mortgage was obviously prepared with the expectation that this stock might have to be withdrawn, and was prepared so that it could be withdrawn without discomfort, if necessity should arise. The defendant thought so little of this French loan mortgage, that when the answer to the present suit was prepared, it never asserted that the stock in question was hypothecated, and, on the contrary, admitted that

the stock was in its possession and under its control, and claimed ownership of the stock (answer, Paragraph XXVII, Record p. 83).

The contention that the defendant never understood that complaining stockholders wanted their share of the stock if they won the case, is so preposterous that it hardly merits an answer.

The mortgage to the United States Trust Company, executed by the defendant in 1911, was with full knowledge of the rights and claims of the plaintiffs. The litigations by the minority stockholders, to protect themselves against the fraudulent acts of the majority stockholders, have been going on without interruption since shortly after the foreclosure sale in 1888 (*id.* p. 209).

When the defendant made its mortgage to the United States Trust Company, its counsel was careful to protect it in the event of an adverse decree at the suit of the minority stockholders, and therefore provided that the defendant may "withdraw all of this stock of the Houston & Texas Central Railroad Company, and to substitute therefor other securities of no less appraised value than the last previous appraised value of the stock withdrawn, which is \$50.00 a share" (see special master's report, *id.* p. 430, fols. 1290-1291).

Defendant is mistaken in its main brief, p. 88, when it states that no request was made for the stock prior to the French Loan. The Lawrence suit then pending in this court, under the title of *Bogert v. Southern Pacific Company*, demanded the plaintiff's share of the stock and the land grants.

The twenty-ninth paragraph of the Lawrence (Plaintiff Bogerts' testator) complaint, after al-

leging the acquisition of all the stock of the new Railroad Company by the Southern Pacific Company, states that

“When the said Southern Pacific Company received and accepted the said Ten Million Dollars of stock, it received the same charged and impressed with a trust for the benefit of the plaintiff and all other minority stockholders, and the said Southern Pacific Company *now holds the said stock as such Trustee, and not in its own right*” (fol. 56, Lawrence Record).

And the first paragraph of the prayer for relief is as follows:

“*First.*—That it be adjudged and decreed and the defendant Southern Pacific Company *acquired and holds the said \$10,000,000. par value of capital stock of the Houston and Texas Central Railroad Company, and all profits and earnings which it has received or may receive from holding said stock as Trustee for the plaintiff and other minority stockholders of the Houston and Texas Central Railway Company, who may come in and contribute to the expenses of this action, in accordance as the respective rights of the said defendant Southern Pacific Company and the said minority stockholders may be adjusted by the Court*” (*id.* fol. 68).

Evidently, counsel appreciated that after their catalogue of dilatory tactics had been exhausted, the court would be obliged to make a decree such as the one herein, and therefore *provided in the mortgage for compliance with a decree which plaintiffs may secure by the withdrawal of the stock and substitution of others of a value which was specified, to wit, \$50 a share.*

In this connection, dates are very important. The mortgage to the United States Trust Company bears date March 1, 1911. At that time, *Lawrence v. Southern Pacific Company* (referred to in the opinions of the court below, Record p. 210, fol. 609, p. 277, fols. 830-834) was pending.

The appeal in that case to the United States Supreme Court was taken in October, 1910. A motion was made by us in January, 1911, to advance the case. Briefs on that motion were submitted February 20, 1911. If the motion had been granted, the case would have been argued and disposed of in the spring of 1911. The defendant succeeded in defeating that motion to advance, and then delayed the argument of the case.

In the meantime, the mortgage to the United States Trust Company was made March 1, 1911, and contained, in addition to the provisions for withdrawal and substitution of collateral, this significant provision:

"No reappraisement of the securities remaining on deposit (with the trustee) shall be made or required *in connection with the withdrawal of securities* (not exceeding \$5,000,000 in the aggregate of appraised value) *requested prior to September 1, 1911.*"

The stock of the Railroad Company deposited with the United States Trust Company under this mortgage, amounted to \$4,999,150 at the appraised value, for the purposes of the mortgage, of \$50 a share, so it could have been withdrawn without any reappraisement if we had won the *Lawrence* suit then pending (see p. 22, Ex. 14).

If our motion to advance had been granted, the *Lawrence* case would have been argued and decided prior to September 1, 1911.

The mortgagor company was granted the right at any time (prior to default) to withdraw all of the stock or securities of any one issue, and to substitute other securities of no less appraised value than the last previously appraised value of the securities withdrawn, and the trustee agreed on request of the company (to be followed by appraisal), upon receipt of the substituted securities, to deliver such of the stock as was then held under the mortgage, and as requested by the company (see p. 23 of Exhibit 14).

The mortgage trustee is a trustee undoubtedly selected by the mortgagor company, as is usual in the matter of corporate mortgages, and there will not be the slightest difficulty in the defendant securing a withdrawal of the stock which it wrongfully pledged and substituting other equally valuable securities.

The defendant had no right to pledge plaintiffs' stock, and with knowledge of this fact, naturally protected itself by the provision above referred to, so that it would have no difficulty in complying with the court's decree. At all events, it cannot appropriate in this way plaintiffs' stock, nor force them to sell at its ridiculous figures of \$25 to \$30 a share, to be paid only after first deducting \$26 per share with interest from 1889, as provided by the decree.

Nothing was said at the trial about this French loan until after the decision by the trial court and on the submission of the proposed interlocutory decree when, for the first time, defendant called the court's attention to the fact that the stock was pledged.

Defendant is, therefore, both technically and equitably estopped from now urging its claim

to force a long and expensive reference, to determine the value of the stock—it will merely mean one more round in its fight for delay.

We may be pardoned if we quote from the very able opinion of the New York Court of Appeals in *Cox vs. Stokes*, 156 N. Y. 491, which seems to have been written for this case. The court, at page 511, says:

“Knowing that their proceedings were thus attacked, Stokes, the committee and the United Lines Telegraph Company continued, in defiance of the reorganization agreement, to carry on their scheme, as embodied in the modified agreement. *Under these circumstances no one could have been misled, simply because the plaintiffs waited to see whether relief would come through the pending litigation, or whether the sale would be confirmed, before commencing their action. The defendants proceeded at their peril, because they had full notice that some of the bondholders at least had not acquiesced in their unlawful acts, but were active in the assertion of their rights.* * * *

The pendency of this representative action was sufficient notice to Mr. Stokes and the other defendants therein that the bondholders were actively resisting the new scheme and were insisting that he should perform his contract, and neither he nor his company can now claim that their subsequent action was taken in reliance upon the acquiescence of the bondholders. (Italics ours.)

The defendant asks that instead of delivering the stock to plaintiffs it may be permitted to pay its value as fixed by defendant, which value they say is 25% to 30% of its par (affidavit of Hemphill, fol. 1346). As the plaintiffs are required to pay \$26 a share, with interest from 1889, in order to receive the stock, the net result will be

that they will receive less than they are required to pay in cash under the decree.

This stock is not on the market, but held by the defendant. Therefore, if the defendant is permitted to pay what it undertakes to say is the value of the stock the plaintiffs will be placed at a great disadvantage.

The plaintiffs have, since the foreclosure sale in 1888, been struggling in the courts to get relief (see list of suits brought, set forth in the opinion below, on overruling defendant's motion for judgment on special defenses, found on p. 209, fols. 626-630).

Now, defendant asks that plaintiffs be compelled to sell to it their stock at a valuation which it fixed at \$25 to \$30 a share (Record, p. 449), although as appears from the testimony of Mr. Gernsheim—a former member of the firm of Kuehn, Loeb & Company (*id.*, p. 395), *he paid in 1881 for a portion of his stock, more than par* (*id.*, p. 396).

The plaintiffs do not wish to sell their stock. They want it, and are entitled to it, and are perfectly willing to pay therefor their *pro rata* of \$26 with interest for each share of their stock held for them by their trustee—the defendant. They should not be forced to sell to their trustee at the ridiculous figures specified by the trustee. The stock, as we have stated, is not on the market, and therefore the court can readily appreciate the great disadvantage under which plaintiffs will labor if an attempt is made to prove its actual, intrinsic value. It would mean that we would have to go into the physical value of the road, its value as an operating adjunct of the Southern Pacific system, its component parts, such as rolling stock, etc., land grants, road beds, and

its value as an independent railroad with reasonable interline rates, not rates imposed upon it now by the defendant for freight originating in its territory for through shipment.

This would mean interminable hearings and examination of witnesses in the State of Texas and elsewhere. This is recognized by defendant which, after interlocutory decree was entered, sought to have the master appointed by the court sit "in the State of Texas for the purpose of taking said testimony, or that an additional master be appointed to take such testimony within the state of Texas, or that an open commission be issued to a master or to some suitable person in Houston, Texas, for the purpose of taking such testimony" (*id.*, p. 316).

To ascertain the value of the railroad company's stock, the numerous items in the Interstate Commerce Commission's reports, respecting the said railroad, would have to be gone into and experts who made up these figures would have to be examined.

The same is true of the voluminous reports of the Railroad Commission of the State of Texas. The Commissioners and their various assistants and experts would, of course, have to be examined to explain how they arrived at their items of valuation.

The valuation, appearing on the state and county tax rolls in which property of the Railroad is situated, would also have to be gone into. Over 7,000 acres of land from the land grants still remain unsold and about 50,000 acres sold on the partial payment plan are outstanding and some of it forfeited to the Railroad every year through defaults in payment.

It is thus apparent that not only expert accountants would have to be employed, but expert witnesses of various kinds would have to be called, and needless to say, the expenses of these expert witnesses and accountants and local attorneys necessarily employed in behalf of the plaintiffs, would probably be prohibitive, so that, if the court were to grant the defendant's request for the modification of the decree in this respect, it would be tantamount to a reversal.

The plaintiffs want and are entitled to their shares of stock, whatever their value may be, and not be driven by a court's decree to sell to their trustee, who has already warned them that it intends to claim that the stock has no value in excess of the amount which the plaintiffs are required to pay in order to receive the stock.

XI.

The decree is responsive to the relief demanded in complaint.

Defendant claims the theory of plaintiffs' action is merely an accounting for the cash value of the stock.

There is no basis for this contention. The complaint alleges that the defendant acquired all the stock of the new Railroad Company as trustee for the benefit of the minority stockholders (27th paragraph of the complaint, Record, p. 18, and 29th paragraph, *id.*, p. 19) concluding, after the recital of the facts, at folio 57: "When the said Southern Pacific received and accepted the said

ten million dollars of stock, it received the same charged and impressed with a trust for the benefit of plaintiffs' testator, and all of the minority stockholders, and said Southern Pacific *now holds the said stock as such trustee, and not in its own name.*"

The complaint also alleges that dividends were paid to the Southern Pacific Company on this stock, and that the Southern Pacific Company was also required under the reorganization agreement to pay certain expenses and charges of reorganization, "the exact amount of which are not known to the plaintiffs" (*id.*, p. 18).

It is thus clearly set forth in the complaint that the plaintiffs are entitled to their share of stock, but because the defendant received certain dividends, the exact amount of which was unknown to the plaintiffs, and expended certain moneys to carry out the reorganization, it was necessary to have an incidental accounting, to determine the exact amount that plaintiffs would have to contribute towards carrying out the reorganization expenses, in order to receive their share of stock. Therefore, the prayer for relief, besides asking that it be adjudged "that the defendant, Southern Pacific Company, *acquired and holds the said ten million dollars par value of capital stock* of the Houston & Texas Central Railroad Company, and all profits and earnings which it has received or may receive from holding said stock, *as trustee for the plaintiffs* and other minority stockholders", also asked that an accounting be had, in order to determine the exact amount of stock due to the plaintiffs, and the amount of money due from the plaintiffs to the defendant (*id.*, p. 26).

As it turned out, because of defendant's statement in its answer of the exact amount paid by

it on the reorganization, and the stipulation entered into between the parties as to the dividends paid to the defendant, it was not necessary to have this accounting. A reference was had before a master, merely to fix the figures upon which the final decree should be based, which figures were practically agreed upon at the reference.

XII.

There is no merit to defendant's contention that its separate defenses should be sustained.

A separate trial was had of these defenses proceeding the main trial and the defenses were dismissed (Record, p. 212). This was unanimously affirmed on appeal (*id.*, p. 489).

A.

THE OLD RAILWAY COMPANY IS NOT A NECESSARY PARTY BECAUSE THIS IS NOT A DERIVATIVE ACTION, AS THE PLAINTIFFS' RIGHT TO RELIEF NEVER BELONGED TO THE CORPORATION; BUT ON THE CONTRARY THE RES OF THIS SUIT IS SOMETHING RECEIVED BY THE MAJORITY STOCKHOLDER IN RETURN FOR ACTS IT CAUSED THE CORPORATION TO PERFORM.

This is, in no aspect of the case, a derivative action, because the stock of the Railroad Company, to which the plaintiffs are entitled, does not belong to the old Railway Company, nor should it go into the treasury of the old Railway Company, any more than the majority of the stock

which is held by and properly belongs to the Southern Pacific Company.

A derivative action rests upon the claim that property belonging to the corporation has been taken out of its treasury in one of the numberless ways known to corporation wreckers, and an action lies *in the right of the corporation*, to compel its return. To such an action the corporation is a necessary party.

That is not this case, on the present complaint. Here, the trustee has secured, through a deal which it made, stock of the new company which, in law, it holds for the benefit of itself and its *cestuis que trustent*, and the beneficiaries are asking their trustee to hand over the proportionate shares of stock to which they are entitled, and which are still in the possession of their trustee.

In such a case as this, we may well ask: What would the court do with the Railway Company, if it had jurisdiction over it? It could not direct the stock, belonging to the plaintiffs, to be paid into the treasury of the old Railway Company. It is not the property of the Railway Company. The stock, when delivered to the plaintiffs, is subject to and burdened with whatever liens, rights or claims may exist against it, or have priority to it. In other words, the plaintiffs take the stock, just as their trustee, the Southern Pacific Company received it, and just as the Southern Pacific Company holds its own stock of the new Railroad Company, to which it is entitled.

The complaint does not seek to disturb the foreclosure, and does not claim that any property should be restored to the old Railway Company, but merely asks that the Southern Pacific Com-

pany account to the plaintiffs and other minority stockholders for the profits realized by it, the Southern Pacific Company.

In the case of *Trotter v. Lisman*, 209 N. Y. 174, the court states the facts as follows:

"The firm of F. J. Lisman & Co. . . . during the performance of said contract . . . controlled the conduct of the affairs and business of the railway company, through ownership and through control of the capital stock thereof; and said firm arranged, directed and controlled the terms and provisions of said contract of June 2, 1902; and the said firm of F. J. Lisman & Co., purporting to act on behalf of the Railway Company, received, in New York City, New York, the sum of \$600,000 and interest thereon, as part of the consideration for said conveyance, and thereupon, and in accordance with the provisions of said contract hereinbefore recited, in October, 1902, said firm of F. J. Lisman & Co., paid the same in said city to the following firms, who were . . . shareholders of the Railway Company. The cause of action set forth in the complaint is the diversion of the assets of the Iron Railway Company by the individual defendants, in New York, in fraud of the rights of the creditors of the railway company. . . . It would seem an intolerable assertion, under the allegations of fact in this complaint, that the court was without jurisdiction to entertain an action for the recovery of the corporate assets appropriated by the defendants. *The plaintiff's cause of action is not derived from the Iron Railway Company; it is one which belongs to him as a creditor to proceed directly against the person to whom, through the action of the corporation and by the subsequent act of Lisman & Co., the only available corporate assets have been*

transferred in fraud of the rights of creditors.

"The Iron Railway Company is not a necessary party to the action; but its presence as a nominal party defendant is proper enough, in order, if the plaintiff be eventually successful in his action, that by its voluntary appearance therein, the other defendants may have the benefit of its being concluded by the judgment."

The legal result is exactly the same as though the Southern Pacific Company had stolen certain Houston & Texas Railway stock certificates *from the plaintiffs*, in which case surely it would not be necessary, in an action to recover these certificates, to have the corporation made a party. The case at bar, therefor, comes directly within the cases of:

- Kuchler v. Greene*, 163 Fed., 91;
- Fletcher v. Newark Tel. Co.*, 55 N. J. Eq., 47;
- Ervin v. Oregon Ry. & Nav. Co.*, 20 Fed., 577, and 27 Fed. 625;
- Payne v. Hook*, 7 Wall., 425;
- Elmendorf v. Taylor*, 10 Wheaton, 153;
- Rogers v. Penobscot Mining Co.*, 154 Fed., 606;
- Sioux City R. & W. Co. v. Trust Co. of N. A.*, 82 Fed., 124;
- Slater Trust Co. v. Randolph-Macon Coal Co.*, 166 Fed., 171;
- Barney v. Baltimore*, 6 Wall., 280;
- Anthony v. Campbell*, 112 Fed., 212;
- North Carolina Mining Co. v. Westfield*, 151 Fed., 290;
- Wellman v. Howland Coal & I. Work*, 19 Fed., 51;

Hunter v. Robins, 117 Fed., 920;
Conery v. Sweeney, 81 Fed., 14;
Newton v. Gage, 155 Fed., 598;
Union Mitt Co. v. Danberg, 81 Fed., 73;
Howe v. Howe Co., 154 Fed., 820;
Watson v. Nat. Life, etc. Co., 162 Fed., 7;
Fisher v. Schropshire, 147 U. S., 133;
Traders' Bank v. Campbell, 81 U. S., 87.

Section 737 U. S. R. S. and Equity Rule 25, fourth paragraph, require the court to proceed with a case even when proper parties are not joined, unless the absentees are absolutely indispensable.

In this connection the court's attention is called to the stipulation at page 69 of the Lawrence record (Ex. F) to the effect that *the old Railway since June 7, 1890, has had no office or place of business, and since the foreclosure in 1888 has held no stockholders or directors meetings, and has had no property and has transacted no business.* (This stipulation is made part of the present record, p. 144, fol. 431.)

The complaint at bar is, practically, an amendment of the case started by Bogert's testator (*Lawrence v. Southern Pacific Co.*, Ex. F), which was dismissed for lack of jurisdiction because of the non-joinder of the Railway Company as a party (180 Fed., 822).

Plaintiff then appealed to this Court on the assumption that a jurisdictional question was involved.

This Court held that no question of the jurisdiction of the court, was involved, and therefore, dismissed the appeal. It did not pass on the question of whether or not the Railway was a necessary party (228 U. S. 137).

The Supreme Court held in *House vs. Muller*, 22 Wall. 42:

“An appeal dismissed for want of or a misjoinder of parties settles nothing but that a suit cannot progress with that contention. It does not conclude either party upon the merits of the matter in controversy, and the plaintiffs, or any one of them may bring another bill, with proper parties, in regard to the subject matter of the first one.”

As the Lawrence complaint asked that the lands of the old Railway and the surplus funds derived from them “be transferred, assigned “and delivered by proper deed of conveyance “to the defendant, Houston Texas Central Railway Company (fol. 24 of the Lawrence complaint, Ex. F), and also demanded that certain moneys held by the Metropolitan Trust Company, which was a party defendant,” be transferred, assigned and delivered by proper deed of conveyance to the defendant, Houston Texas Central Railway Company, the court held that the complaint showed that these lands had been improperly taken from the Railway Company in the foreclosure proceedings, and that if the plaintiff recovered in that case damages or specific performance it would result “in the payment of the money and the transfer of the property to the (Railway Company) corporation” (180 Fed. Rep., 825); and the court distinguished the case of *Kuchler v. Greene*, and other like cases, because in those cases the relief demanded did not restore anything “to the corporation itself to be there devoted to corporation purposes “for the benefit of the plaintiff, as is the case in “the present action” (180 Fed. Rep., 825).

The suit at bar was tried before Judge Chatfield, *who also tried the Lawrence suit*, and he differentiated the two complaints (see op., Record, pp. 277-278, also p. 207).

B.

THIS SUIT IS NOT BARRED BY ELECTION OR ESTOPPEL.

In the first place, the election must have been of **an inconsistent remedy to create an estoppel**. The prior litigations were always directed toward a recovery of the plaintiffs' share in the property of the Railway Company. The suits were derivative.

In the second place, whether or not the prior litigations are inconsistent with the present suit is immaterial, as the court distinctly held in those suits that plaintiffs had misconceived their *remedy* and the complaints were dismissed on grounds which did not go to the merits (op. Circuit Court of Ap., p. 486). Therefore, plaintiffs are not precluded from prosecuting this suit, even if it is based on a remedial right inconsistent with prior litigations.

This rule is stated in 15 Cyc, 262, with an abundant citation of authorities.

To the same effect:

Harall v. Davis, 168 Fed., 187.

Union Central Life Ins. Co. v. Drake, 214 Fed. 536.

Mills v. Parkhurst, 126 N. Y., 189.

Henry v. Harrington, 193 N. Y., 218.

C.

PLAINTIFFS HAVE NOT BEEN GUILTY OF LACHES.
THE CONDITION OF THE RES IS AS IT WAS IN 1889.
NO RIGHTS OF INNOCENT PARTIES HAVE INTERVENED.

Not only has there been no laches on the part of plaintiffs but on the contrary, the committee of minority stockholders have been most actively and incessantly struggling to secure their rights.

The foreclosure decree was entered in May, 1888, and the sale took place the following September. Immediately after the entry of the decree, and before the sale, Walter Lawrence (plaintiffs' testator), Cornelius MacArdell and other stockholders, holding altogether Ten thousand shares of stock of the par value of one million dollars, formed a committee of stockholders to act together for their mutual protection against the acts of the Southern Pacific Company, which had obtained control of the Railway Company and forced a foreclosure sale *so that it could buy in the property under the consent decree* (Record, p. 20).

The Carey suit (Ex. B.) was commenced in Texas the year after the foreclosure sale (Carey record, Ex. B., p. 2). It attacked the foreclosure decree and asked to have the property of the old Railway Co. returned to the receivers of the Railway (Carey record, Ex. B, fol. 41, p. 21).

In September, 1889, within a year of the foreclosure sale Michael Gernsheim on behalf of himself and other stockholders similarly situated, obtained an injunction in the Supreme Court of the State of New York, restraining Frederic P. Olcott, the Central Trust Company, and others

from disposing of the properties of the Railway Company, which they had bought in under the reorganization agreement, and from distributing the stock of the new Railroad Company, which was formed under the said agreement. This injunction was subsequently modified. Later on in April, 1890, the injunction was dissolved without prejudice to a further application upon an amended complaint (Par. 34 of the complaint, *id.* p. 21).

In August, 1890, within four months of the dissolution of the first injunction, Gernsheim, on behalf of himself and other stockholders similarly situated, obtained an order to show cause in the New York Supreme Court against the Central Trust Company, the Southern Pacific Company, Olcott and others, why the defendants in said suit should not be prevented from carrying out the reorganization agreement. This motion was denied in the following fall, and the order affirmed by the General Term in October, 1891 (*id.* p. 22).

In August, 1891, prior to the termination of the Carey suit and Gernsheim motion, and less than three years after the foreclosure sale, Cornelius MacArdell, a member of the committee of stockholders, in the interest of himself, and the minority stockholders, commenced an action in the New York Supreme Court against the Southern Pacific Company, Olcott and the Central Trust Company and others, and sought an injunction restraining Olcott from parting with the lands purchased by him under the consent decree, and preventing Olcott and the other defendants from carrying out the other terms of the reorganization agreement pending the trial of the action, and asked that the foreclosure sale be vacated, and the reorganization agreement annulled on the ground of fraud, and that the de-

defendants restore to the Railway Company the land, franchises and properties which had been taken by the foreclosure sale.

This action was brought to trial in March 1902, *and was not decided until* June, 1903, and judgment was entered in August, 1903, in favor of the defendants, the court refusing to set aside the foreclosure sale (*id.* p. 172).

The plaintiff appealed the next month and the Appellate Division affirmed the judgment in April, 1905, and in July the plaintiff appealed to the Court of Appeals, which, in October, 1907, affirmed the judgment in favor of the defendant *by a divided court*. The minority judges held that the complaint was broad enough to cover plaintiffs' contention that as the Southern Pacific Company had received the entire issue of ten millions of stock of the Railway Company, a trust should be impressed upon the property of the old Railway Company, in the hands of the Southern Pacific Company, for the benefit of the minority stockholders, and that therefore, the judgment appealed from should be reversed, *and the Southern Pacific Company account to the minority stockholders for their share of the stock* (*id.* p. 172).

The *MacArdell* case started in New York; while the *Carey* case was pending in Texas. It was therefore reserved generally on the court calendar pending the termination of the *Carey* litigation.

The court's special attention is called to the opinion in the *MacArdell* case in 189 N. Y., 368, from which it will be seen that the *Lawrence* case was a mere continuance of the *MacArdell* case, with some of the causes of action in that case changed or dropped.

The *Lawrence* complaint was drawn to meet the views of the prevailing opinion in the *MacArdell*

case, but as it asked for the return of the lands and the proceeds of their sales to the old Railway Company, the court held the Company a necessary party, and dismissed the complaint for lack of proper parties.

Pending the appeal in the Supreme Court, plaintiffs' testator died, and plaintiffs were substituted as complainants, and *within a few months after the decision of the Supreme Court* the present action was brought, eliminating all matter which, the Circuit Court had held, made the Railway Company a necessary party.

There was never a lapse of more than a few months between the termination of one suit and the commencement of the succeeding one, all brought by the plaintiffs therein on behalf of the association of minority stockholders.

In equity one or more persons may sue for all, where the question is one of common or joint interest, and it is not necessary for the protection of the interests of all parties to have more than one party plaintiff.

This well-known rule is stated in 30 Cyc, 134, with citation of authorities.

The Court said in *Cox v. Stokes*, 156 N. Y., 491, at page 511:

"Under these circumstances no one could have been misled, simply because the plaintiffs had waited to see whether relief would come through the pending litigation, or whether the sale would be confirmed, before commencing their action. The defendants proceeded at their peril, because they had full notice that some of the bondholders at least had not acquiesced in their unlawful acts, but were active in the asserting of their rights. We repeat, as applicable to this case, so far as the question of laches is concerned,

the language of the court in *Boardman v. Lake Shore & Michigan Southern Ry. Co.* (84 N. Y., 157, 183): 'It appears that there has been, ever since the expiration of the time when the dividends were due, an active and continuous litigation, and a sharp controversy in the courts with other parties against the old corporation and the defendant by stockholders who are similarly situated with the plaintiffs, to recover dividends upon the preferred stock. * * * The defendant necessarily was acquainted with the character of the litigation with the questions involved and the claim of the preferred stockholders to the dividends; and in the face of these facts, with full notice of the nature of the claim, has no ground for insisting that it would have acted otherwise if the plaintiffs had sued at an early day. It was not required that each particular stockholder should sue for his share of the dividends to preclude the defendant from claiming an acquiescence and estoppel; and it is quite sufficient that it was advised of the character of the claim of the respective stockholders. *The plaintiffs and other stockholders were entirely justified in awaiting the result of suits pending without incurring the hazard of losing their rights on account of the lateness of their demand, so the plaintiffs in this action under all the circumstances, were not obliged to sue more promptly in order to save their rights. They had a cause of action and did not lose it by their silence, even if they knew that Mr. Stokes was advancing money on the strength of the modified agreement because he is presumed to have known that that agreement was made without authority, and he had notice from various legal proceedings against himself and others that the bondholders were attacking it on that ground. There was no estoppel, because he had no right to act in reliance upon the silence of some bondholders, when others were*

acting in behalf of all. The summons and complaint in the Roebbling suit were served on him individually and as President of the United Lines Telegraph Company in August, 1885. The object of that action was to restrain the execution of the modified agreement and to compel performance of the reorganization agreement. *The pendency of this representative action was sufficient notice to Mr. Stokes and the other defendants therein that the bondholders were actively resisting the new scheme and were insisting that he should perform his contract and neither he nor his company can now claim that their subsequent action was taken in reliance upon the acquiescence of the bondholders.* The reorganization agreement was signed by more than one hundred different parties and it was not necessary that each should sue in order to preserve his rights. *Suit by one of a class, in behalf of all, relieves all from the imputation of laches.'*" (Italics ours.)

To the same effect:

Pacific Railway Co. v. Missouri Railway Co., 111 U. S., 505;

Illinois Grand Trunk Rwy Co. v. Wade, 140 U. S., 65;

Gilmer v. Morrison, 43 Fed., 456;

Pendy v. Carlton, 87 Fed., 41;

Peppin v. Sage, 129 Fed., 657.

Johnson v. Atlantic G. & W. I. Co., 156 U. S., 618;

Galliher v. Cadwell, 145 U. S., 368.

In this case there has been no delay, but a continuous assertion of the rights claimed by the plaintiffs.

The question of laches turns not simply upon the number of years which have elapsed between the accruing of the right and the assertion of it, but also upon the changes of value and of circumstances accruing during that lapse of years.

Galliher v. Caldwell, 145 U. S., 368.

In *Simmons Creek Coal Co. v. Doran*, 142 U. S., 417, a delay of forty years was held to be no bar to a suit.

Laches is not mere delay, but *delay that works a disadvantage to the defendant*.

Wheeling Bridge Co. v. Raymond Co., 90 Fed., 189 at p. 195;

Galliher v. Caldwell, 145 U. S. 368;

Johnson v. Atlantic Co., 156 U. S., 618;

Pacific R. R. Co. v. Atlantic R. R. Co., 20 Fed., 277;

Underwood v. Dugan, 139 U. S., 380;

Halstead v. Grinnan, 152 U. S., 413.

In *Northern Pacific Co. v. Boyd*, 228 U. S., 482. Boyd was a creditor of the original company which was sold out on foreclosure to the Northern Pacific, and he proceeded against the original company trying to follow its assets but was unsuccessful, and more than ten years after the foreclosure he brought his action directly against the Northern Pacific Company, and it was held that this delay on his part before attacking in equity the reorganization plan, was not such laches as barred his suit where the corporation and the stockholders were not prejudiced by his delay, and where the delay was not the result of inexcusable negligence. In that case, although *Boyd did not sue the Northern Pacific*

for more than 17 years after his right of action accrued, he did bring actions against the Coeur d'Alene R. R. & Navigation Company, and when his appeal was finally dismissed he brought his suit in equity against the Northern Pacific R. R. Co., insisting that said company was liable for the debt of the Coeur D'Alene Company. He brought his bill in equity against the Northern Pacific Company within a year of the dismissal of his appeal against the Coeur d'Alene Company. The Supreme Court said (228 U. S., p. 509)..

“But the doctrine of estoppel by laches is
 “not one which can be measured out in days
 “and months, as though it were a statute of
 “limitations. For what might be inexcusable
 “delay in one case would not be inconsistent
 “with diligence in another, and unless the
 “nonaction of the complainant operated to
 “damage the defendant, or to induce it to
 “change its position, there is no necessary
 “estoppel arising from the mere lapse of
 “time. *Townsend v. Vandewerker*, 160 U. S.,
 “186; 40 L. ed. 388; 16 Sup. Ct. Rep., 258.

“In this case the defendants and their
 “stockholders have not been injured by
 “Boyd's failure to sue. His delay was not
 “the result of inexcusable neglect, but in
 “spite of diligent effort to put himself in the
 “position of a judgment creditor of the Coeur
 “d'Alene so as to be able to proceed in equity
 “to collect his debt. He accomplished this
 “fact only after protracted litigation, begin-
 “ning in 1887 and continuing through the
 “present appeal (1913). The more important
 “chapter of the different cases, the lawsuits
 “within lawsuit, are reported in 5 Idaho, 528,
 “51 Pac. 408; 6 Idaho, 97, 53 Pac. 107; 6
 “Idaho 638, 59 Pac. 426; 85 Fed. 838; 35 C.
 “C. A., 295; 93 Fed. 280; 174 U. S., 801; 43
 “L. ed. 1187, 19 Sup. Ct. Rep. 884, 170 Fed.

“779; 101 C. C. A. 18; 177 Fed. 804. They
 “involve a series of independent transactions
 “in different courts, between Spaulding and
 “the Coeur D’Alene Company; Boyd and
 “Spaulding; Boyd and the Coeur D’Alene
 “Company; the Northern Pacific railroad
 “and Coeur D’Alene and finally the fore-
 “closure of the Northern Pacific Railroad and
 “its purchase by the Northern Pacific Rail-
 “way.

The defendant has not been injured or prejudiced by lapse of time although it called an officer of the Southern Pacific Company, Mr. Van Deventer, to prove the loss of the company’s records because of a fire in New York. He admitted that all entries of the railway’s business were sent to the San Francisco office, and that the records in New York were merely copies of transcripts received from San Francisco. No attempt was made at any stage of this suit to show that any evidence was unavailable through lapse of time.

The trial judge said (Record p. 209):

“The various records of the case however
 “indicate that no serious difficulties are pre-
 “sented upon this score, and that, strange as
 “it may seem, the case can now be tried with
 “a record of the necessary testimony in sub-
 “stantially as complete a way as undertaken
 “many years ago.”

D.

THE PREVIOUS LITIGATION BY THE COMMITTEE OF MINORITY STOCKHOLDERS IS NOT RES ADJUDICATA. THE QUESTIONS HERETOFORE DECIDED WERE DIFFERENT FROM THOSE AT BAR, AS THEY WERE ALL UPON TECHNICAL DEFENSES, BUT NEVER ON THE MERITS.

(Opinion Circuit Court of Appeals, Record, p. 489, fol. 1475.)

"A judgment against the plaintiff on the single ground that he has mistaken his remedy, or form of action is no bar to his subsequent suit brought in the proper form."

23 Cyc. 1148.

and at page 1159:

"Where a plaintiff is defeated in an action based upon a certain theory of his legal rights, or as to the legal effects of a given transaction or state of facts, through failure to substantiate his view of the case, this will not preclude him from renewing the litigation without any change in the facts, but basing his claim on a new and more correct theory."

and at page 1167:

"If plaintiff has misconceived his remedy and the suit is dismissed on that ground without an adjudication of the merits, it is no bar to a second action rightly brought; nor is it a bar where the new action, although based on the same facts, proceeds upon a different theory as to their legal consequences or the relative rights of the parties."

2 *Black on Judgments*, 2nd Ed., Section 609, paragraph 6 says in speaking of estoppel by a former judgment between the same parties :

"It is not conclusive as to other matters, which might have been, but were not litigated or decided."

See also Section 611.

2 *Freeman on Judgments*, Section 253, at page 453 says :

"In order to successfully invoke this rule it must be shown that in the former action the issue was in fact litigated and decided. *It is not sufficient that it was therein so involved that it might have been litigated.*" (Italics ours.)

To the same effect see :

Russell v. Russell, 129 Fed. 434;
Kroegher v. C. C. Co., 119 Fed. 614;
Crockett v. Miller, 110 Fed. 729;
 2 *Black on Judgments*, Section 609;
Freeman on Judgments, Section 253;
Kimball v. Tripp, 136 Calif. 631;
Dennison v. U. S., 168 U. S. 241;
Fidelity T. & S. Co. v. Louisville, 174 U. S. 429;
Cromwell v. County of Sac, 94 U. S. 351.

The burden of proof is upon the party claiming an estoppel by a former judgment to show clearly that the facts in issue were determined in the former action."

Zoeller v. Reilly, 100 N. Y. 102.

To same effect:

Lewis v. Ocean Nav. Co., 125 N. Y. 341;
Stokes v. Foot, 172 N. Y. 327;
 24 *Am. & Eng. Ency. of L.*, 2nd Ed., p.
 776, and cases in foot note.

XIII.

The two intervention petitions of Michael Gernsheim and of Sara Rosenfeld and Rosetta Cohn, executors, etc., were properly granted.

The Gernsheim petition (Record, p. 380) and the Rosenfeld petition (*id.* p. 367) alleged the ownership of their stock for some years prior to the foreclosure sale, and this and the other material facts in these petitions were found true by the master in his report (*id.* p. 431).

These two intervenors filed their petitions for intervention after interlocutory decree and before final decree.

The Circuit Court of Appeals affirmed the Trial Court, and said:

“Intervention after interlocutory decree in favor of the complainant was proper.” (Record, p. 490).

Equity Rules 37 and 38 provide for intervention under the circumstances disclosed on this record.

The Circuit Court of Appeals said in *Central Trust Company v. Chicago, Rock Island, etc. Co.*, 218 Fed. 236:

“Where claimant’s rights are finally disposed of, an intervention is necessary for their protection. The right to intervene is absolute.”

To the same effect:

Central Ry. etc. Co. v. Pettus, 113 U. S. 116.

1 *Foster's Federal Practice*, 3rd Ed., p. 434.

Defendant's contention that Gernsheim should not have been allowed to intervene, because of his prior litigation, has no merit, as neither of the Gernsheim cases was tried or disposed of on the merits.

See op. Circuit Ct. of Ap., p. 470.

In addition to this, the rule is well recognized that the fatuous choice of a fancied remedy that never existed is no defense to an action to enforce an actual remedy, even if inconsistent.

Harrill v. Davis, 168 Fed. 187.

Henry v. Harrington, 193 N. Y. 218.

15 *Cyc.* 262.

XIV.

The decree should be affirmed.

Respectfully submitted,

CHARLES E. HUGHES,
H. SNOWDEN MARSHALL,
DAVID GERBER,
DUDLEY F. PHELPS,

Counsel for Plaintiffs-Respondents.

Supreme Court of the United States. 1

**SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,**

AGAINST

**HENRY L. BOGERT, TOWNSEND LAW-
RENCE and ANITA LAWRENCE, as
Executors under the Last Will and
Testament of Walter B. Lawrence,
deceased, suing on behalf of them-
selves and other stockholders of the
Houston & Texas Central Railway
Company, similarly situated, who
may come in and contribute to the
expenses of this action; HENRY
FITCH and RUSSELL H. LANDALE,
as Survivors of Committee of Stock-
holders; SARA ROSENFELD and
ROSETTA COHN, as Executrices
under the Last Will and Testament
of Charles Minzensheimer and
Michael Gernsheim,
Plaintiffs-Respondents.**

**No. 305.
October 2
Term, 1918.**

**In the Matter of the Application of
ALBERT M. POLACK, to be made a
party to the action in this Court and
for Amendment of the judgment
herein so as to include him in its
benefits, or in the alternative for a
modification of the judgment in case
the plaintiff's cause of action is
affirmed,**

Intervenor.

3

**Your petitioner, ALBERT M. POLACK, a citizen of
the United States and a resident of the City of
New York and State of New York, praying for
leave to be made a party to the above entitled action
in this Court and for the amendment of the judg-**

- 4 ment herein so as to include petitioner within its benefits, or, in the alternative that if the aforesaid relief is refused, that this court, in case it sustain the right of the plaintiffs to the relief asked for, shall modify the decree of the Court below by directing that the action shall be referred to a Master and that three months public advertisement, or such other suitable notice as to this Honorable Court shall seem proper, be given to all the stockholders similarly situated with plaintiffs, to appear before said Master and establish their claims against the defendant, and that the District Court be directed to enter judgment for such stockholders
- 5 as shall prove such claims in the same manner that the judgment has been entered in favor of the plaintiffs herein, upon their contributing their share of the expenses, respectfully represents:

FIRST: That he is the owner and holder and is now in the possession of 400 shares of the capital stock of the Houston & Texas Central Railway Company as follows:

Crt. No.	Name	Dated	Countersigned	No. of Shares
11090	M. Gernsheim & Co.	Aug. 2, 1881	Aug. 3, 1881	10
11091	"	"	"	10
11092	"	"	"	10
11093	"	"	"	10
11094	"	"	"	10
11095	"	"	"	10
6 11096	"	"	"	10
11097	"	"	"	10
11098	"	"	"	10
11099	"	"	"	10
11100	"	"	"	10
11101	"	"	"	10
11102	"	"	"	10
11103	"	"	"	10
11104	"	"	"	10
11105	"	"	"	10
11106	"	"	"	10
11107	"	"	"	10
11108	"	"	"	10
11109	"	"	"	10

Ctf. No.	Name.	Dated	Countersigned	No. of Shares	7
10547	Van Schaick & Co. of N. Y.	July 11, 1888	July 12, 1888	50	
10470	"	June 12, 1884	June 14, 1884	50	
11161	"	Sept. 30, 1881	Oct. 1, 1881	10	
11162	"	"	"	10	
11163	"	"	"	10	
11164	"	"	"	10	
11165	"	"	"	10	
11166	"	"	"	10	
11167	"	"	"	10	
11168	"	"	"	10	
11169	"	"	"	10	
11170	"	"	"	10	

That all of said certificates are duly endorsed in blank by M. Gernsheim & Company and Van Schaick & Company in whose name said certificates were registered and have been issued.

8

That your petitioner purchased the said 400 shares of Houston & Texas Central Railway Company stock on December 20, 1916, and the certificates therefor were delivered to him and payment therefor was made by him on December 21, 1916, and that he has been the sole owner and holder thereof since said last mentioned date.

SECOND: That immediately after the purchase of the said stock and the receipt of said certificates your petitioner applied, by his representative and employee, to the Southern Pacific Company, at its office in the City of New York, for information with respect to said stock and to have the same transferred into his name and his representative was informed by the said Southern Pacific Company through some person in charge of its Transfer Department that the Houston & Texas Central Railway Company was not in existence, that the Southern Pacific Company had nothing to do with the said stock and would not and could not trans-

9

- 10 fer it and that the said stock had no value whatever.

11 THIRD: This action is one brought by certain minority stockholders of the Houston & Texas Central *Railway* Company, suing on behalf of themselves and all other stockholders of the Houston & Texas Central Railway Company similarly situated who may desire to come in and contribute to the expenses of the action, to establish a resulting trust in favor of said stockholders to certain shares of the Houston & Texas Central *Railroad* Company, which shares it was alleged in the complaint in said action, the defendant Southern Pacific Company had acquired and now holds. The suit accordingly is a representative action and the assignors of said 400 shares of stock purchased and now owned by your petitioner, were prior to the transfer to your petitioner of said stock and of all their rights, title and interest in and to the same were and your petitioner, since the date of his purchase and the receipt of said stock, was and is similarly situated to the plaintiffs.

- 12 That by reason of said sale and transfer to your petitioner of said 400 shares of stock he acquired and now has all and every right, title and interest, claim and demand in respect to said stock that the former holders and transferors thereof at any time heretofore held and possessed.

 FOURTH: Upon information and belief, your petitioner alleges that all the facts, allegations and statements set forth and contained in the bill of complaint herein are true, and he refers to said bill of complaint and the facts and allegations

therein contained and adopts them as part of his 13
petition herein, with the same force and effect as
though herein set forth at length.

FIFTH: This action was duly tried before the
District Court of the United States for the Eastern
District of New York and resulted in favor of the
plaintiffs, and on the 13th day of December, 1915,
an interlocutory decree was entered herein, wherein
it was adjudged and decreed that the defendant
Southern Pacific Company now has in its posses-
sion and holds for the benefit of complainants in
said action, and other stockholders of the Houston 14
& Texas Central *Railway* Company, respectively,
who may come in and contribute to the expenses
of this action 129-2/5 shares of the common stock
of the Houston & Texas Central *Railroad* Com-
pany for each 100 shares of the stock of the Houston
& Texas Central *Railway* Company, owned and
held as in said decree set forth; and said decree also
provided that any party may thereafter apply, upon
notice to the other parties, for such further order
and direction as may be proper to carry out the
purposes of said decree. No part of said judgment
has been complied with by said Southern Pacific 15
Company.

The shares of stock so decreed to be held in trust
are now, petitioner is informed and believes, of a
value in excess of \$350. a share, and if petitioner is
granted the relief sought and the decree of the
District Court is affirmed in this Court, he will be
entitled to receive from the defendant Southern
Pacific Company stock of a value in excess of
\$140,000, upon the payment of a small sum of
money, as in said decree provided.

16 **SIXTH:** That your petitioner and his assignors, from whom he acquired said 400 shares of Houston & Texas Central Railway Company and all of their rights, claims and demands with respect thereto, were similarly situated as to their ownership of said 400 shares of Houston & Texas Central Railway Company stock as the plaintiffs, and your petitioner represents that by reason of his ownership and possession of said 400 shares of stock he is now entitled, upon his contributing his *pro rata* part of the expenses of this litigation, to all the benefits, advantages and awards in this suit in a decree made or to be made herein.

17

SEVENTH: Your petitioner shows that 200 of the shares of stock owned and held by him are registered in the name of M. Gernsheim & Company, and 200 shares are registered in the name of Van Schaick & Co. of New York. The said shares were not deposited with the Committee of Stockholders, represented by Richard Whitmore, Henry Fitch and Russell H. Landale, and are not included in the shares which the above-named persons as Trustees of the stockholders, produced before the Special Master herein.

18

EIGHTH: Your petitioner further shows that on or about October 5, 1916, a final decree was rendered herein adjudging and decreeing that each and every allegation contained in the complaint of Henry L. Bogert and others herein is true and adjudging that the defendant, the Southern Pacific Company, now holds and possesses shares of stock of the Houston & Texas Central Railroad Company, as Trustee, for the benefit of complainants in said action and all other stockholders of the Hous-

ton & Texas Central *Railway* Company similarly 19
 situated, and further adjudging and decreeing that
 upon the payment of a sum of money as in said
 decree provided and the surrender of the stock held
 by such parties, the Southern Pacific Company
 should deliver certain shares of said Houston &
 Texas Central *Railroad* Company to said parties,
 together with various dividends received on the
 same since the organization of said Company, all
 of which is more particularly set forth in said final
 decree to which petitioner begs leave to refer with
 the same force and effect as if herein fully and at
 length set out.

20

NINTH: That an appeal from said final judg-
 ment, made and entered herein October 5, 1916,
 was taken by the defendant Southern Pacific Com-
 pany, now the appellant herein, to the Circuit
 Court of Appeals for the Second Circuit, and the
 said judgment was in all respects affirmed by deci-
 sion made and handed down by said Circuit Court
 of Appeals on July 2nd, 1917.

TENTH: That at the time of the purchase by your
 petitioner of said stock on December 20th, 1916, he
 did not know of the pendency of this suit, nor of 21
 the decision by the United States District Court for
 the Eastern District of New York, filed July 25th,
 1915, nor of the interlocutory decree filed October
 5, 1916, nor of the appeal to the Circuit Court of
 Appeals, then pending, nor of any of the proceed-
 ings in this suit then pending, but believing the
 statements made by the representative of the South-
 ern Pacific Company heretofore stated in paragraph
 Second, and relying upon them, he made no further
 inquiry or investigation as to the value of said

- 22 stock or of any matters or things relating to the same.

ELEVENTH: That your petitioner learned for the first time of the pendency of this suit and the final decree of October 5, 1916, and of the decision of the Circuit Court of Appeals on July 2nd, 1917, on August 25th, 1917, and thereafter he immediately made diligent inquiries of his rights as a stockholder of the Houston & Texas Central *Railway* Company and as the owner and holder of 400 shares of its stock, and after said August 25th, 1917, he learned for the first time of the pendency
23 of this suit and the matters and things pleaded, tried and decided therein and the nature and extent of his rights as the owner and holder of 400 shares of the capital stock of the Houston & Texas Central *Railway* Company.

TWELFTH: Immediately upon being advised of the pendency of this action and of the decision of the Circuit Court of Appeals handed down July 2nd, 1917, and before the remittitur had been entered in the District Court of the United States for the Eastern District of New York, your petitioner made a motion upon notice to all the
24 parties to this suit in and before the District Court of the United States for the Eastern District of New York, for an order permitting him to intervene and be made a party plaintiff in this action and for such other and further relief as to the Court might seem just and proper; said motion being made upon his petition, a copy whereof is hereto annexed and made a part hereof, marked "Exhibit A". Said motion was argued before the said Court on September 12, 1917, written briefs submitted and the matter taken under advisement

by the District Judge, and thereafter and on or 25
 about the 24th day of September, 1917, a memorandum decision was filed in this Court by the District Judge before whom said motion was made, a copy of which is hereto annexed, marked "Exhibit B".

THIRTEENTH: That the defendant Southern Pacific Company made application to this Court for a writ of *certiorari* for the reversal of the said judgment affirmed by the Circuit Court of Appeals for the Second Circuit, which writ was granted on or about the 23rd day of November, 1917, and said action is now pending for hearing before this 26
 court, and by reason thereof the District Court has no jurisdiction over said cause and has no power to grant the relief prayed for by the petitioner in the application before the District Court hereinbefore mentioned and prayed for herein, namely, to permit the intervention of the petitioner in this cause and amend the judgment as herein asked for, except by permission of this Court, which now has exclusive jurisdiction over said cause.

FOURTEENTH: That no other or previous application has been made to this Court for the relief 27
 prayed for herein, and no application therefor has been made to the District Court for this relief, except the application made to the District Court, but, by reason of the memorandum decision, that application cannot now be granted, and your petitioner therefor applies to this Court, pursuant to the direction contained in the memorandum decision of the District Court.

FIFTEENTH: That if the relief herein asked for is not granted much time of a trial Court will be

28 consumed in proving petitioner's said cause of
action and petitioner will be put to large and un-
necessary expense in making proof of the facts
already alleged and proven in this action.

29 WHEREFORE, petitioner prays an order of this
Honorable Court to permit him to intervene and
upon establishing the truth of the matters set forth
in this petition, that it be adjudged that the peti-
tioner shall be made a party to this action and in-
cluded in the judgment herein upon such terms
and conditions as to the payment of the costs of
this action and attorneys' fees as the other parties
to the action are required to pay, or such as to
this Court may seem just and proper, and peti-
tioner further prays in the alternative, if such re-
lief be refused by this Court, that permission be
given him to make application to the District
Court for the Eastern District of New York for
leave to intervene in this action upon the terms
and conditions as to costs and counsel fees im-
posed upon other intervenors, or upon such terms
and conditions as to costs and counsel fees as may
seem to that Court to be just and proper and that
the said District Court be granted permission by
30 this Honorable Court, upon finding the facts set
forth on petitioner's petition to be true, to admit
petitioner as a party thereto upon such terms and
conditions as to costs and counsel fees as shall be
proper; and that the said District Court be granted
permission to amend the judgment herein so as to
add thereto a provision for the benefit of Peti-
tioner similar to that now contained in said judg-
ment in favor of other stockholders of said Houston
& Texas Central *Railway* Company; and petitioner
further prays in the alternative that if the afore-

said relief is refused that this Court, in case it 31
 sustains the right of the plaintiffs to the relief
 asked for, shall modify the decree of the Court
 below by directing that the action shall be referred
 to a master and three months' public advertise-
 ment, or such other suitable notice as to this
 Honorable Court shall seem proper, be given to
 all stockholders similarly situated with plaintiffs
 to appear before said master and establish their
 claims against the defendant and that the District
 Court be directed to enter judgment for such stock-
 holders as shall prove such claims in the same
 manner that judgment has been entered in favor
 of the plaintiffs herein, upon their contributing 32
 their share of the expenses of this petition.

The petitioner further prays for such other and
 further relief as to the Court may seem just or
 proper.

ALBERT M. POLACK,
 Petitioner.

STATE OF NEW YORK, }
 County of New York, } ss. :

ALBERT M. POLACK, being duly sworn, deposes
 and says, that he is the petitioner named in the
 within petition, that he has read the foregoing peti- 33
 tion and knows the contents thereof; that the
 same is true to his own knowledge, except as to
 the matters therein stated to be alleged upon in-
 formation and belief, and that as to those matters
 he believes it to be true.

ALBERT M. POLACK

Sworn to before me this 17 }
 day of September, 1918. }

MARY V. MCGUINNESS

Commissioner of Deeds,
 of the City of New York.

N. Y. Co. Clk. No. 4. Kings Co. Clk. No. 3

N. Y. Co. Reg. No. 20001. Kings Co. Reg. No. 100

Commission Expires Feb. 5, 1920

34

"Exhibit A".**DISTRICT COURT OF THE UNITED STATES****FOR THE EASTERN DISTRICT OF NEW YORK.**

35

HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action; HENRY FITCH and RUSSELL H. LANDALE, as Survivors of Committee of Stockholders; SARA ROSENFELD and ROSETTA COHN, as Executrices under the Last Will and Testament of Charles Minzensheimer and Michael Gernsheim,

Complainants,

AGAINST

SOUTHERN PACIFIC COMPANY,
Defendant.

36

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition of Albert M. Polack, verified the 29th day of August, 1917, and upon the pleadings and all proceedings had herein, the undersigned will move this court at a Term thereof to be held in the United States Court House and Post Office Building, in the Borough of Brooklyn, County of Kings, City

and State of New York, on the 5th day of Sep- 37
 tember, 1917, at 2 o'clock in the afternoon of that
 day, or as soon thereafter as counsel can be heard
 for an order permitting the said Albert M. Polack
 to intervene and to be made party plaintiff in the
 above-entitled action, and for such other and fur-
 ther relief as to the court may seem just and
 proper.

Dated, New York, August 30th, 1917.

Yours, &c.,

NORBERT HEINSHEIMER,
 Solicitor for Petitioner,
 Office & Post Office Address, 38
 165 Broadway,
 Manhattan, New York City.

To

MESSRS. DITTENHOEFER, GERBER & JAMES,
 Solicitors for Complainants,
 32 Broadway, Borough of Manhattan,
 City of New York.

MESSRS. JOLINE, LARKIN & RATHBONE,
 Solicitors for Defendant,
 54 Wall Street, Borough of Manhattan,
 City of New York.

39

GEORGE GORDON BATTLE, ESQ.,
 Solicitor for Sarah Rosenfeld and others,
 Intervening complainants,
 37 Wall Street, Borough of Manhattan,
 City of New York.

40 DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK.

41 HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action; HENRY FITCH and RUSSELL H. LANDALE, as Survivors of Committee of Stockholders; SARA ROSENFELD and ROSETTA COHN, as Executrices under the Last Will and Testament of Charles Minzensheimer and Michael Gernsheim,

Complainants,

AGAINST

SOUTHERN PACIFIC COMPANY,
Defendant.

42 The petition of ALBERT M. POLACK respectfully shows to the court:

That your petitioner resides at No. 276 West Seventieth Street, in the Borough of Manhattan, City, County and State of New York, Southern District of New York, and is engaged in business under the trade name of A. M. Polack & Co., as a dealer in stocks, bonds and investment securities at 25 Broad Street in the same Borough, City, State and District.

That he is the owner and holder and is now in the possession of 400 shares of the capital stock of the Houston & Texas Central *Railway* Company as follows: 43

Crt. No.	Name	Dated	Countersigned	No. of Shares
11090	M. Gernsheim & Co.	Aug. 2, 1881	Aug. 3, 1881	10
11091	"	"	"	10
11092	"	"	"	10
11093	"	"	"	10
11094	"	"	"	10
11095	"	"	"	10
11096	"	"	"	10
11097	"	"	"	10
11098	"	"	"	10
11099	"	"	"	10
11100	"	"	"	10
11101	"	"	"	10
11102	"	"	"	10
11103	"	"	"	10
11104	"	"	"	10
11105	"	"	"	10
11106	"	"	"	10
11107	"	"	"	10
11108	"	"	"	10
11109	"	"	"	10
10547	Van Schaick & Co. of N. Y.	July 11, 1888	July 12, 1888	50
10470	"	June 13, 1884	June 14, 1884	50
11161	"	Sept. 30, 1881	Oct. 1, 1881	10
11162	"	"	"	10
11163	"	"	"	10
11164	"	"	"	10
11165	"	"	"	10
11166	"	"	"	10
11167	"	"	"	10
11168	"	"	"	10
11169	"	"	"	10
11170	"	"	"	10

That all of said certificates are duly endorsed in blank by M. Gernsheim & Company and Van Schaick & Company in whose names said certificates were registered and have been issued.

That your petitioner purchased the said 400 shares of Houston & Texas Central *Railway* Company stock on December 20, 1916, and the certifi-

46 cates therefor were delivered to him and payment therefor was made by him on December 21, 1916, and that he has been the sole owner and holder thereof since said last mentioned date.

That immediately after the purchase of the said stock and the receipt of said certificates your petitioner applied by his representative and employee to the Southern Pacific Company at its office in the City of New York, for information with respect to said stock and to have the same transferred into his name and his representative was informed by the said Southern Pacific Company through some person in charge of its Transfer Department that
47 the Houston & Texas Central *Railway* Company was not in existence, that the Southern Pacific Company had nothing to do with the said stock and would not and could not transfer it and that the said stock had no value whatsoever.

That at that time your petitioner did not know of the pendency of this suit nor of the decision by the United States District Court for the Eastern District of New York, filed July 30, 1915, nor of the interlocutory decree filed December 13, 1915, nor of the final decree filed October 5, 1916, nor of the appeal to the Circuit Court of Appeals or of any of
48 the proceedings in this suit, but believing the statements made by the representative of the Southern Pacific Company and relying upon them, he made no further inquiry or investigation at that time. That your petitioner learned for the first time of the pendency of this suit and the decisions therein and the decision of the Circuit Court of Appeals handed down on July 2, 1917, of August 25, 1917, and immediately thereafter he made diligent inquiry into his rights as a stockholder of the Houston & Texas Central *Railway* Company and is

the owner and holder of 400 shares of said stock 49
 and since said August 25, 1917, he has learned of
 the pendency of this suit and the matters and things
 pleaded, tried and decided therein and the nature
 and extent of his rights as the owner and holder of
 400 shares of the capital stock of the Houston &
 Texas Central *Railway* Company.

This suit is a representative action brought by
 the plaintiffs on behalf of themselves and other
 stockholders of the Houston & Texas Central *Rail-*
way Company similarly situated who may desire
 to come in and contribute to the expenses of the
 action. The assignors of said 400 shares of stock 50
 purchased and now owned by your petitioner were
 prior to the transfer to your petitioner of said stock
 and of all their rights, title and interest in and to
 the same were and your petitioner, since the date
 of his purchase and the receipt of said stock, was
 and is similarly situated to the plaintiffs. That
 by the sale and transfer to your petitioner of said
 400 shares of stock he acquired and now has all and
 every right, title, interest, claim and demand in
 respect to said stock that the former holders and
 transferors thereof at any time heretofore held and
 possessed.

On information and belief, your petitioner al- 51
 leges all the facts and allegations set forth in the
 bill of complaint herein are true and refers to said
 bill of complaint and the facts and allegations
 therein contained and adopts them with the same
 force and effect as though herein set forth at length.

The trial of this suit was terminated in favor of
 plaintiffs, by the entry of an interlocutory decree
 on the 13th day of December, 1915, wherein it was
 adjudged and decreed that the defendant Southern
 Pacific Company now has in its possession and

52 holds for the benefit of the complainants and the other stockholders of the Houston & Texas *Railway* Company respectively who may come in and contribute to the expenses of this action, 129-2/5 shares of the common stock of the Houston & Texas Central *Railroad* Company for 100 shares of stock of the Houston & Texas Central *Railway* Company owned and held, as in said decree set forth.

That your petitioner is and his assignors from whom he acquired said 400 shares of the stock of the Houston & Texas Central *Railway* Company and by their rights, claims and demands with respect thereto, were situated similarly as to their ownership of said 400 shares of Houston & Texas Central *Railway* Company stock as the plaintiffs and your
53 petitioner represents that by reason of his ownership and possession of said 400 shares of stock, he is now entitled, upon his contributing his *pro rata* part of the expenses of the plaintiffs to all the advantages, benefits and awards of this suit and the decree made herein.

Your petitioner shows that 200 shares of the stock owned and held by him are registered in the name of M. Gernsheim & Company and 200 shares are registered in the name of Van Schaick & Company.
54 The said certificates for 200 shares in the name of M. Gernsheim & Company were not deposited with nor represented by R. B. Whittemore, Henry Fitch and Russell H. Landale, the committee or trustees for certain stockholders of the Houston & Texas Central *Railway* Company and are not included in the shares which the said above named persons as trustees of the stockholders produced before the Special Master herein.

The petitioner further shows that upon a petition made and filed herein on July 7, 1916, Michael

Gernsheim was permitted to intervene with respect 55
to and as the owner of 740 shares of the stock of
the Houston & Texas Central *Railway* Company,
and that it appears from the direct examination of
Mr. Gernsheim before the Special Master on July
21, 1916, that the 740 shares with respect to which
he was allowed to intervene and claim the benefit
of the decree herein were in the name of M. Gerns-
heim & Company and were not any of the shares
or certificates owned and possessed by your peti-
tioner.

Your petitioner further shows that the 200 56
shares of stock owned and held by him, the cer-
tificates of which are in the name of Van Schaick
& Company were not deposited with or represented
by the said committee and trustees for the stock-
holders of the Houston & Texas Central Railway
Company and were and are not included in the
shares produced by them and proven before the
Special Master herein and the 500 shares of stock
in the name of Van Schaick & Company produced
by Mr. Landale before the Special Master were not
any of the shares or certificates owned and pos-
sessed by your petitioner.

Your petitioner further shows that after the 57
interlocutory decree, made herein December 13,
1915, wherein and whereby the matters involved
herein were referred to Joseph G. Cochran, Esq.,
as Special Master, as in said interlocutory decree
set forth, the said Special Master has terminated
the hearings and has presented his report to this
court and the final decree was made and filed herein
on October 5th, 1916. That on or about Novem-
ber 18, 1916, pending the defendant's appeal to the
Circuit Court of Appeals, all proceedings to enforce
the decree herein on the part of the complainants

58 were stayed, and that on or about December 29,
1916, the defendant filed its petition for appeal to
the United States Circuit Court of Appeals for the
Second Circuit, and the same was allowed and by
stipulation all proceedings in this court were
stayed as though a supersedeas had been obtained.
That the said appeal has been heard by the said
United States Circuit Court of Appeals and on
July 2nd, 1917, the said decree appealed from was
affirmed. That thereafter the defendant applied
for a rehearing and on August 24, 1917, the said
application for rehearing was denied. Your peti-
59 tioner is informed and believes that the said de-
fendant has applied or is about to apply to the
Supreme Court of the United States for a writ of
certiorari to review said final decree and affirmance
and your petitioner shows that since the date of
said interlocutory and final decrees herein there
have been no proceedings, actions or conduct on
the part of any of the parties hereto with reference
to said litigation or the subject matter thereof, ex-
cept the prosecution of said appeal and that there
has been no change of any kind in the position of
any party hereto with reference to said suit and
the subject matter thereof and that none of the
60 provisions of said final decree have been performed.

Your petitioner is ready and willing to comply
with all such reasonable terms as the court may
impose for permitting your petitioner to intervene
herein as a party plaintiff and become and be en-
titled to the benefits of said interlocutory and final
decrees herein as in said decrees set forth.

WHEREFORE your petitioner prays that an order
may be made upon this petition, permitting your
petitioner to intervene herein as party plaintiff

in order that he may have the benefit of any decree 61
or judgment entered or to be entered herein.

And your petitioner will ever pray, &c.

No previous application for the relief herein
asked for has been made to any court or judge.

Dated, August 30th, 1917.

NORBERT HEINSHEIMER,
Solicitor for Petitioner,
165 Broadway, Manhattan,
City of New York.

CITY, COUNTY AND STATE OF NEW YORK, }
Southern District, } ss:

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ALBERT M. POLACK being duly sworn, deposes
and says, that he has read the foregoing petition
and knows the contents thereof; that the same is
true to his own knowledge except as to the matters
therein stated upon information and belief and
that as to those matters he believes it to be true.

ALBERT M. POLACK.

Sworn to before me this 29th }
day of August, 1917. }

JOSEPH P. FALLON, JR.,
[SEAL] Commissioner of Deeds,
City of New York.

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64

Exhibit "B".**MEMORANDUM.****UNITED STATES DISTRICT COURT****EASTERN DISTRICT OF NEW YORK.****BOGERT vs. SOUTHERN PACIFIC.**

The application for *certiorari* has been made in vacation. Under the present rule, this leaves with this Court only jurisdiction to act under Section 240 of the Judicial Code where a stay of proceedings might be proper.

65

The Court will not have opportunity, before next week, to give to the application to intervene the consideration necessary and, inasmuch as the proceedings by *certiorari* have, in substance, the effect of an appeal, this Court is unwilling to make any order which would possibly affect the question to be presented upon that appeal.

The petitioners can, in this Court, make no application in an equity action while an appeal is pending, which might go to the merits and which might be possible in the Appellate Court where a hearing *de novo* can be had if *certiorari* should be granted.

66

The present motion will be further taken into consideration in case *certiorari* is denied, or any further memorandum may be submitted on the point now suggested, if the parties deem it advisable, but owing to the delay, through the absence of the judge before whom the application is pending, this preliminary statement is thought to be proper to avoid any unintended consequences from the necessary delay in decision.

Dated Sept. 24, 1917.

THOMAS I. CHATFIELD,
U. S. D. J.

SUPREME COURT OF THE UNITED STATES. 67

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

AGAINST

HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action; HENRY FITCH and RUSSELL H. LANDALE, as Survivors of Committee of Stockholders; SARA ROSENFELD and ROSETTA COHN, as Executrices under the Last Will and Testament of Charles Minzensheimer and Michael Gernsheim,
Plaintiffs-Respondents.

No. 305. 68
October
Term, 1918.

In the matter of the Application of ALBERT M. POLACK, to be made a party to the action in this Court and for Amendment of the judgment herein so as to include him in its benefits, or in the alternative for a modification of the judgment in case the plaintiff's cause of action is affirmed.

69

SIRS:

PLEASE TAKE NOTICE, that I shall, on or before the 7th day of October, 1918, file in the office of

70 the Clerk of the Supreme Court of the United States, the foregoing petition for leave to intervene in the above entitled cause, or for permission to apply to the District Court of the United States for the Eastern District of New York, for permission to intervene in said cause, and to amend the judgment therein; and will also file a brief in the above entitled cause, a copy of which brief will be served upon you more than ten days prior to said 7th day of October, 1918, and that I shall on the 7th day of October, 1918, being a motion day of the October Term, 1918, of the *Supreme Court of the United States*, upon the opening of Court, 71 or as soon thereafter as counsel can be heard, at the Court Room of the Supreme Court of the United States, move that the petitioner, Albert M. Polack, be permitted to intervene in the above entitled cause, or given permission to apply to the District Court for the Eastern District of New York for permission to intervene in said cause, and for the amendment of said judgment as in the Petition prayed for, or in the alternative that if the aforesaid relief is refused that this Court, in case it sustain the right of the plaintiffs to the relief asked for, shall modify the decree of the Court below by directing that the action shall be referred 72 to a master and three months' public advertisement or such other suitable notice as to this Honorable Court shall seem proper, be given to all the stockholders similarly situated with plaintiffs, to appear before said master and establish their claims against the defendant, and that the District Court be directed to enter judgment for such stockholders as shall prove such claims in the same manner that judgment has been entered in favor of the plain-

tiffs herein upon their contributing their share of 73
the expenses of this litigation.

Dated, September 17th, 1918.

Yours, etc.,

NORBERT HEINSHEIMER,
Attorney for Albert M. Polack,
Petitioner,
165 Broadway,
Borough of Manhattan,
New York City.

To:

LEWIS H. FREEDMAN, ESQ.,
54 Wall Street,
New York City.

74

ARTHUR H. VAN BRUNT, ESQ.,
54 Wall Street,
New York City.

Counsel for the above named Appel-
lant; and

H. SNOWDEN MARSHALL, ESQ.,
61 Broadway,
New York City,

A. J. DITTENHOEFER, ESQ.,
32 Broadway,
New York City,

75

DUDLEY F. PHELPS, ESQ.,
32 Broadway,
New York City,

Attorneys for Plaintiff-Respondents.

and

MESSRS. SCOTT, GERARD & BOWERS,
46 Cedar Street,
New York City,

Attorneys for Corn Exchange Bank
and others, Petitioners.

SUPREME COURT OF THE UNITED STATES.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

AGAINST

HENRY L. BOGERT, TOWNSEND LAW-
RENCE and ANITA LAWRENCE, as
Executors under the Last Will
and Testament of Walter B.
Lawrence, deceased, suing on be-
half of themselves and other
stockholders of the Houston and
Texas Central Railway Company
similarly situated who may come
in and contribute to the expenses
of this action, HENRY FITCH and
RUSSELL H. LANDALE, as Surviv-
ors of Committee of stockhold-
ers, SARA ROSENFELD and ROSETTA
COHN, as Executrices under the
Last Will and Testament of
Charles Minsenhimer and Mich-
ael Gernsheim,

Plaintiffs-Respondents.

No. 305.
October Term, 1918.

IN THE MATTER

OF

The applications of FERGUS REID
and ALBERT M. POLACK to be made
parties to the action in this court
and for amendment of the judg-

ment herein so as to include them in its benefits, or in the alternative, for a modification of the judgment in case the plaintiffs' cause of action is affirmed,
Intervenors.

BRIEF IN OPPOSITION TO PETITIONS FOR INTERVENTION.

Petitions have heretofore been filed in behalf of Corn Exchange Bank, Francis P. O'Reilly and Henry J. Chase, in No. 773, October Term, 1917, and a brief in opposition to said petitions has been filed.

The briefs which are filed in support of the petitions herein are analogous, and in every respect similar to those filed on behalf of the Corn Exchange Bank, Francis J. O'Reilly and Henry J. Chase. For brevity, the defendant begs leave to refer to said briefs and asks that they be deemed as filed as briefs herein.

With reference to the petition filed on behalf of Albert M. Polack, the Court's attention is directed to the allegations of his petition from which it affirmatively appears that he can in no sense be regarded as being similarly situated to the plaintiffs or to the other petitioners. From the answer filed to his petition it affirmatively appears that the four hundred shares of stock of which he claims to be the owner were purchased at a sale at public auction in the City of New York, on December 20, 1916, and that he paid for said shares of stock the sum of \$65.16, which price included a sales fee and the cost of necessary stamps. He alleges that said shares of stock are worth \$350 a share, and that if he be permitted to intervene he will be entitled to receive from the defendant stock of a value in excess of \$140,000 upon the payment of the small sum

as in the decree provided. In view of this situation, the defendant certainly should be entitled to have its day in court.

For the reason set forth in the brief filed in opposition to the other petitions for intervention, the defendant asks that the petitions of the said Fergus Reid and Albert M. Polack be denied.

Respectfully submitted,

ARTHUR H. VAN BRUNT,

LEWIS H. FREEDMAN,

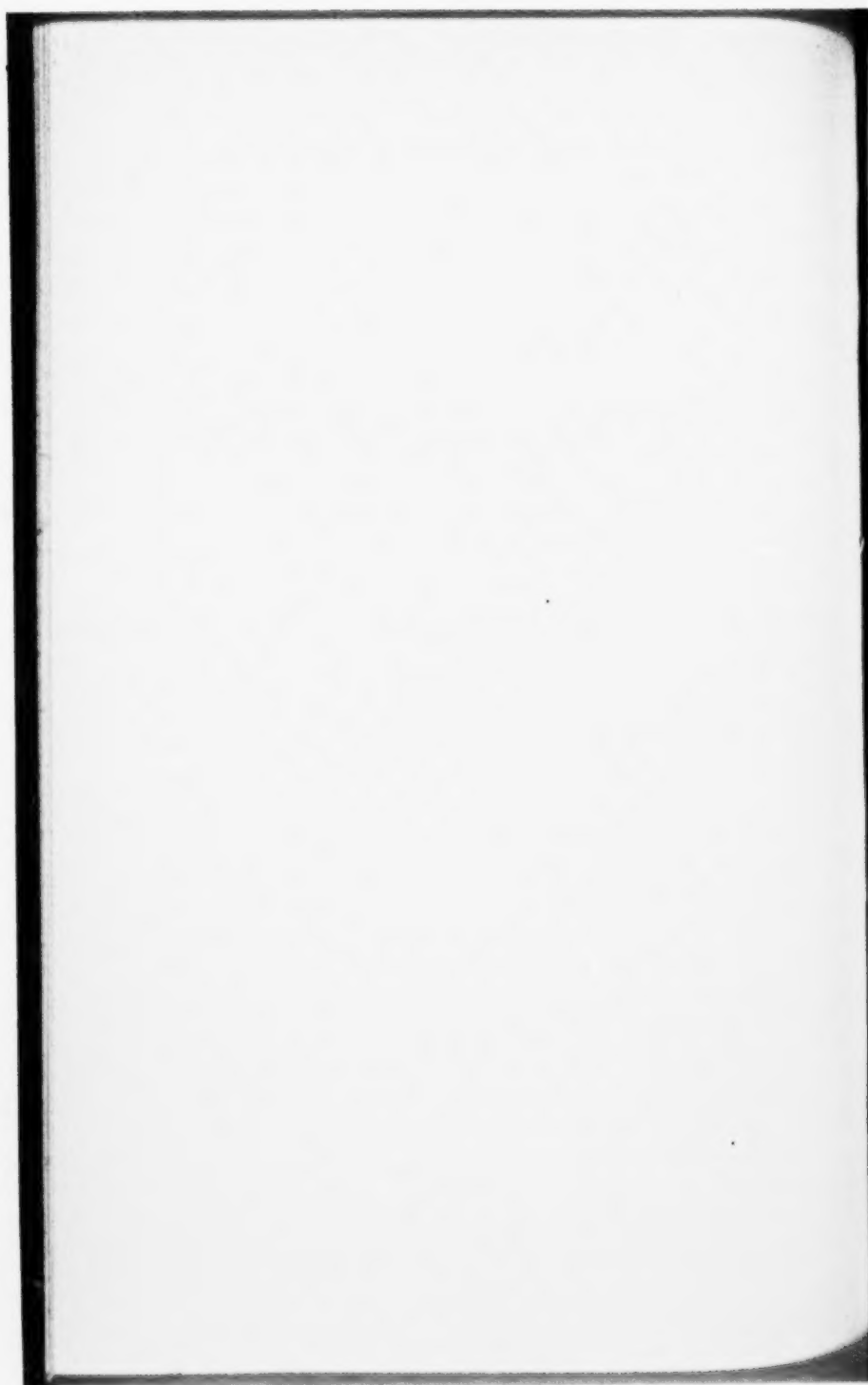
Attorneys and Counsel for Defendant,

Office & Post Office Address,

54 Wall Street,

Borough of Manhattan,

City of New York.



8

Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 305.

SOUTHERN PACIFIC COMPANY,
Petitioner,

AGAINST

HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company similarly situated, etc., *et al.*,

Plaintiffs, Respondents.

IN THE MATTER

OF THE

Application of ALBERT M. POLACK, to be made a party to the action in this Court and for Amendment of the judgment herein so as to include him in its benefits, or in the alternative for a modification of the judgment in case the plaintiffs' cause of action is affirmed.

Intervenor.

Reply Brief on behalf of Albert M. Polack,
Intervenor.

The Southern Pacific Company, petitioner herein, in its brief to this Court, discusses in the Tenth Point the original petition of intervention filed in

this cause by Albert M. Polack, owner of 400 shares of the capital stock of the Houston and Texas Central Railway Company.

Its chief objection to his petition is that this intervenor purchased his shares for a small sum of money and in the event of the affirmance of the decree below and the granting of his prayer he would become entitled to a large recovery. Polack by his purchase and acquisition of the stock succeeded to all the rights of former owners and as they could have asserted their rights in respect of their ownership of this stock all such rights necessarily pass to and can be asserted by their transferee.

Pollitz v. Gould, 202 N. Y. 11.

Continental Securities Co. v. Belmont, 206 N. Y. 7.

Intervention after final decree while, perhaps, not usual is not necessarily forbidden. If the subject matter of the litigation be a fund which by final decree has been distributed, then to allow intervention after such decree and distribution would be futile, but in a suit like the instant case, which is a class suit, instituted for the very purpose of avoiding numerous and unnecessary suits and the situation of the defendant has not been altered, then to permit intervention after final decree, especially when the case is still without final determination, is not subversive of any rule of law or the rights of the defendant. The only issue between this intervenor and the defendant differing from the issues presented in the main cause is the ownership by the intervening petitioner of the shares of stock upon which he posits his right to remedy. This issue is a simple one and the facts with respect thereto are substantially correct, as set forth in the petition for intervention and the answer thereto.

The intervening petitioner, Polack, acted diligently immediately upon learning of his rights with respect to the shares acquired by him, and whatever

delay there may have been in his steps toward intervention in this suit was due to the defendant, whose agents, when applied to for information as to the stock, misled him (Petition of Polack, p. 3, fols. 9 and 10).

So long as the contentions and claims of the minority stockholders, as a class, were persistently, continuously and pertinaciously asserted by the nominal plaintiffs, acting for the Committee of minority stockholders, no minority stockholder similar in interest to the plaintiffs was guilty of laches in not bringing an action in his own behalf or seeking to have himself made a party to the suits pending. Such action on the part of a stockholder would either have been improper or unnecessary and the Southern Pacific Company itself would have opposed any such action upon the very ground that the rights of such stockholder were being protected in the pending litigations.

The defense of laches to the claim of petitioner Polack is without merit in the situation presented in this cause. During the entire period of time that has elapsed since the Southern Pacific Company possessed itself unlawfully of the property of the minority stockholders of the Houston & Texas Central Railway Company, there has not been an instant when the claims of these minority stockholders have not been pressed. During this entire time the petition of the Southern Pacific Company with respect to this property has not changed and the rights of third persons have not intervened. *A party cannot complain of laches that does no harm. It is only laches by which he has suffered that works an estoppel or gives a right of action.* Laches in bringing suit is no defense unless because thereof the defendant has been prejudiced. And in this cause, the defendant has not been prejudiced by the failure of Polack, or his predecessor in title to the 400 shares, to become a party to the litigations at different times or to this cause until now.

The doctrine of laches is based upon grounds of public policy which require for the peace of society the discouragement of stale demands.

Mackall v. Casilear, 137 U. S. 556.

The rule as to laches is a yielding rule to be applied according to the circumstances and equities in each case.

Halstead v. Grinnan, 152 U. S. 412, p. 416.

Gunderson v. Illinois Trust Savings Bank,
100 Ill. App. 461.

In the event the decree of the Circuit Court is affirmed the defendant Southern Pacific Company has suffered nothing whatever by the failure of Polack, or his predecessors in title to the 400 shares of stock he owns, to bring themselves into the litigation earlier, for up to the present moment not a *single* minority stockholder of the Houston & Texas Central Railway Company, whether a party or not to the suit, has obtained anything. In such event to grant the intervention would be no hardship to the defendant or prejudice it in any way. While to remit Polack to a new action with the necessity for proving the entire case over would be to impose upon him a burden not only unnecessary, but of no advantage to the Southern Pacific Company, except that by the exceeding difficulty of such new litigation, and the exceptional cost and delay involved, it might prevent Polack from pursuing his rights to a just recovery.

NORBERT HEINSHEIMER,
Attorney for Petitioner,
Albert M. Polack,
165 Broadway,
New York City.

Supreme Court of the United States.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

AGAINST

HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action; HENRY FITCH and RUSSELL H. LANDALE, as Survivors of Committee of Stockholders; SARA ROSENFELD and ROSETTA COHN, as Executrices under the Last Will and Testament of CHARLES MINZESHEIMER and MICHAEL GERNESHEIM,
Plaintiffs-Respondents.

No. 305.
October
Term, 1918.

In the Matter of the Application of ALBERT M. POLACK, to be made a party to the action in this Court and for Amendment of the judgment herein so as to include him in its benefits, or in the alternative for a modification of the judgment in case the plaintiff's cause of action is affirmed.

BRIEF IN SUPPORT OF PETITION OF ALBERT M. POLACK.

This is an application by petitioner, who is similarly situated to the plaintiffs in this action, for

leave to intervene in this action, now pending in this Court, as a party plaintiff and to become entitled to the benefit of the decree and judgment below, in the event it shall be affirmed in this Court, upon such terms as to costs and otherwise as this Court shall determine.

Petitioner became the owner of 400 shares of the stock of the Houston & Texas Central Railway Company, now held by him, on December 20th, 1916. The final decree in the District Court was entered October 5, 1916. Immediately upon his purchase and ownership of said stock petitioner applied to the Southern Pacific Company for the transfer of said shares to his name, and made due inquiries with reference to said Houston and Texas Railway Company, and was informed by representatives of the Southern Pacific Company that the Houston & Texas Central Railway Company was not in existence and that his stock was without value (Petition, fol. 9). These 400 shares of stock had never been deposited by the former owners with the Committee of Stockholders, who were parties plaintiff in the above action, and such former owners were only parties to said action in so far as the action was a representative action, or an action for the benefit of a class, and was instituted and maintained by the complainants in said action for the benefit of all stockholders of the Houston & Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of the action.

On July 2nd, 1917, the Circuit Court of Appeals for the Second Circuit affirmed the judgment of the District Court of October 5th, 1916. On August 25, 1917, the petitioner, *for the first time*, learned of the pendency of this action, the judgment of Oc-

tober 5th, 1916, and its affirmance on July 2nd, 1917, by the Circuit Court of Appeals (Petition, fol. 22). He immediately, by petition dated August 30th, 1917, applied, upon notice to all of the parties in this action, to the District Court of the United States for the Eastern District of New York, for leave to intervene in the action. Upon this petition his application was heard, the other parties to the action appearing and opposing. The motion was argued and briefs submitted, and on September 24, 1917, Hon. Thomas I. Chatfield, United States District Judge, who heard the motion, filed a memorandum decision, a copy of which is annexed to the petition herein (Petition, Exhibit B, p. 22). A writ of *certiorari* for the review of said judgment of the Circuit Court of Appeals by this Honorable Court was granted to the defendant Southern Pacific Company on or about the 23rd day of November, 1917, and said action is now pending for hearing before this Court and is No. 305 on the Calendar of the October, 1918, Term of this Court.

By reason of the granting of the writ of *certiorari*, the petitioner cannot make or further pursue his application for leave to intervene in the District Court and in his memorandum above referred to the Honorable Judge of said District Court stated that in the event the writ of *certiorari*, the application for which was then pending, was granted, the petitioner could apply in this Court for such leave to intervene and a hearing *de novo* had upon his application.

It is only, therefore, in this manner that petitioner can obtain the relief to which he is entitled, upon the facts set forth in the bill of complaint herein, which bill of complaint petitioner has adopted as his own, without resorting to an expen-

sive and lengthy proceeding in Equity, in which a great deal of time and expense would be involved in establishing the same cause of action as has already been litigated to judgment in the case at bar.

The above entitled action was brought by complainant Bogert and others, minority stockholders of the Houston & Texas Central Railway Company, suing on behalf of themselves and all other stockholders of the Houston & Texas Central Railway Company similarly situated who may come in and contribute to the expenses of the action. The suit was in equity against the Southern Pacific Company to establish a resulting trust in and to certain shares of the capital stock of the Houston & Texas Central *Railroad* Company which the Southern Pacific Company had acquired and now holds as a result of its improper and illegal conduct as a majority stockholder of the Houston & Texas Central *Railway* Company, which was a company controlled by the defendant Southern Pacific Company. In the present action a decision for the plaintiffs was handed down July 30th, 1915, and an interlocutory decree thereon was entered December 13, 1915. By this interlocutory decree of December 13th, 1915, it was adjudged that the Southern Pacific Company held the shares of the Houston & Texas Central *Railroad* Company, received by it under the reorganization of the old Company, the Houston & Texas Central *Railway* Company, for the benefit of the plaintiffs in the action and all other stockholders of the Company similarly situated proportionately, and by said interlocutory decree certain matters were referred to a Special Master for examination and report. No time limit was fixed in the decree of December 13th, 1915, within which any proof should be presented before the Special Master,

either as to any of the matters referred to him, or as to the rights of other stockholders similarly situated, and no notice was given by the Special Master, or by any party to the proceedings, to all other stockholders of the *Houston & Texas Railway Company* similarly situated, to appear before the Special Master and offer proof as to their ownership of the stock and interest in the litigation. After the interlocutory decree certain other minority stockholders similarly situated to the complainants did intervene, by permission of the District Court, and presented their proof before the Special Master, and the order in the District Court granting leave for this intervention was sustained by the Circuit Court of Appeals. After the coming in of the Special Master's report a final decree was made in the District Court on October 5th, 1916. Thereafter the defendant, *Southern Pacific Company*, appealed to the Circuit Court of Appeals and the decree of the District Court was affirmed on July 2nd, 1917, and the mandate of the Circuit Court of Appeals upon said affirmance was filed in the office of the Clerk of the District Court on August 24th, 1917.

The petitioner, Albert M. Polack, who is the owner of 400 shares of the *Houston & Texas Central Railway Company* stock, never knew of this litigation until on or about August 25th, 1917, although long prior thereto he had inquired at the office of the defendant, *Southern Pacific Company*, with respect to the stock and had been informed that foreclosure had taken place a great many years before; that the Company was defunct and that the stock was valueless and could not be transferred.

The Circuit Court of Appeals in its opinion, affirming the decision of the District Court, stated

that this suit is a representative or class suit under Equity Rule No. 38. It is therefore apparent that the adjudications pertinent to this application are those that are known as class suits. Prior to the final decree of October 5th, 1916, intervention, of course, would have been granted, as it was to certain other minority who had not originally been parties to this suit who were granted leave to intervene and make proof before the Special Master of their interests in this litigation.

There are, therefore, before this Court on this petition two questions for determination: first, whether intervention may be allowed after final decree; second, whether this Court has jurisdiction to permit the intervention asked for.

It is submitted by the petitioner that as a matter of law he really was a party complainant to this suit at all times, and that this application is not a question of bringing in a new party or adding a new complainant, but only of adding his name to the record as party complainant, so that he may take the benefit in his own name of the decree already entered in his favor.

The granting of the writ of *certiorari* herein took this action entirely out of the jurisdiction of the District Court,

Evans & Howard Fire Brick Co. v. U. S.,
236 U. S. Reports, at p. 211,

and the District Court is, therefore, without jurisdiction to permit the petitioner to intervene and, as a matter of fact, the District Court had in its memorandum on petitioner's application said that in the event of the granting of the writ of *certiorari* that Court would cease to have jurisdiction to permit intervention and that petitioner would

have to make his application to this Court *de novo*.

Unless, therefore, this Court grants the relief asked for, petitioner will not be able to intervene and obtain the benefit of the decree of affirmance, to which in law and equity he should be entitled as a minority stockholder similarly situated to complainants in said action. In that event the only relief that the petitioner might have would be to commence a new action against the same defendant upon the same facts and try out the entire action upon its merits. This would involve much expense and time and be entirely unnecessary, as the only points to be decided upon petitioner's application are those mentioned above. This application can be heard before the main case is argued and long before that time petitioner can have proven the truth of the matters set forth in his petition and have been made a party to share in the benefits of the judgment in the event it should be affirmed by this Court, or, in case of reversal, bear his share of the costs of the litigation.

POINT I.

This Court has power to permit the intervention asked.

1 Foster's Federal Practice, 5th Edition (1913), Sec. 114, page 423.

See also Sec. 258, page 821.

A very full consideration of class suits and the effect of the decrees thereunder is to be found in Street's Federal Equity Practice, Vol. 1, Chap. 12, Sec. 539, *et seq.*

Attention is especially called to Section 549, which is as follows:

"It has always been understood in the English chancery, and apparently in the equity courts of this country, that the decree in class suits is binding on all the persons in interest whether they are actually before the court or not; at least this is so where the interest of those persons is properly represented before the court. Those who are actually before the court as plaintiffs or defendants are considered and treated as being the proper legal representatives of those who are absent but who are in like interest. The true class suit in fact supplies an instance of virtual representation. When the court once gets jurisdiction over the subject-matter, it will proceed to clean up every element of the controversy, as it affects each and every party in interest; and to this end all that is necessary is that the different persons in interest shall be before the court either in person or by representation. It is obvious that the court, before proceeding against parties who are such by representation only, will take care to see that all are properly and fairly represented. This has always been fully insisted on. Granting that the idea of proceeding against, or on behalf of, parties who are such by representation only is a valid one,—and that it is based on a sound principle of jurisprudence is obvious from the fact that in many cases justice could not otherwise be administered,—it follows that a decree entered in a class suit must of necessity be valid and binding as to all. Those who are represented are concluded in the same decree and to the same extent as are those who are actually before the court. This is a rational and just conclusion, and it has the sanction of the established usage of the English chancery. The jurisdiction of the court over the subject-matter enables the court to determine the rights of all persons to

the property, provided only they are sufficiently represented before the court."

One of the earliest cases (*Handford v. Storie*) is to be found in 2 Simon's and Stuart's Reports (in Chancery), 196, decided in 1825. In this case one holder of a debenture had filed a bill in behalf of himself and all other debenture holders against the maker thereof, praying for an account and payment. After the institution of his suit and while it was pending he sold his own debenture to the maker upon advantageous terms and thereupon consented that the bill be dismissed before any decree was made upon it, and the bill was accordingly dismissed. Subsequently another debenture holder, on behalf of himself and other debenture holders, filed a bill against the complainant in the former action, praying that such complainant repay to the Trustees the money he had received in order that it might be distributed under the trust deed. The Court held that where a plaintiff files a bill on behalf of himself and all other persons of the same class he retains the absolute dominion of the suit until the decree and may dismiss the bill at his pleasure; but after a decree he cannot deprive the other persons of the same class of the benefits of the decree, the Vice-Chancellor saying, in conclusion:

"The reason for the distinction is, that before Decree no other person of the class is bound to rely upon the diligence of him who has first instituted his Suit, but may file a Bill of his own; and that, after a Decree, no second Suit is permitted."

In *Brinkerhoff v. Bostwick*, 99 N. Y. 185, the Court also held that in a representative or class

action a judgment, when taken, was for the benefit of all the stockholders, and the rights of the other stockholders or parties to the action by representation at once attach to the judgment. The Court said:

"In this case, therefore, it was not necessary that the other plaintiffs be joined as nominal plaintiffs. The suit could have gone to judgment without their presence as nominal plaintiffs and the judgment would have been just as effectual and just as beneficial for them as if they had been actually named as parties plaintiffs."

The jurisdiction of the Court to allow intervention, even after final decree, is fully sustained in the case of

United States v. Northern Securities Co.,
128 Fed. Rep. 808.

This action, in which intervention was sought, had already passed to a final decree, and the decree had been affirmed by the Supreme Court of the United States, and at this stage of the case an application was made for leave to intervene. The application was denied, but not upon the ground of jurisdiction, Thayer, District Judge, saying:

"Applications for leave to intervene in a case after the entry of a final decree are very unusual. They are never granted, and, as a matter of course, owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected or to avoid some complication that is liable to arise."

In the case of

New York Guaranty & Indemnity Co. v.
Tacoma Railway & Motor Co., 83 Fed.
Rep. 365,

an application to intervene was made after the entry of a final decree, and the Circuit Court considered and passed upon the question as to whether the District Court had jurisdiction to allow intervention after the entry of the final decree, and held that the District Judge was correct in entertaining and granting the application, at least in the same term.

An application for leave to intervene is substantially as though a supplemental bill had been filed to enforce the decree already rendered in favor of one of the class entitled to the benefits thereof, and it is well settled that a Court of Equity has jurisdiction to carry into effect its own orders and decrees of judgment which remain unreversed, when the subject matter is the same in both proceedings. The general rule upon the subject is stated in

Story's Equity Practice, 9th Edition, Sec.
338.

"A supplemental bill may also be filed as well after as before a decree; and the bill, if after a decree, may be either in aid of the decree, that it may be carried fully into execution; or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it, or by the defence made to it; or to bring forward parties before the Court; or it may be used to impeach the decree, which is the peculiar case of a supplemental bill, in the nature of a bill of review, of which we shall treat hereafter. But where a supplemental bill is brought in aid of a decree, it is merely to carry out and to give fuller effect to that decree, and not to obtain relief of a

different kind on a different principle; the latter being the province of a supplementary bill in the nature of a bill of review, which cannot be filed without the leave of the court."

Root v. Woolworth, 150 U. S. 401.

Upon the question of the right to intervene, either by petition or by supplemental bill, after final decree, where there is a general interest in a fund which has not yet been distributed, we cite the following cases:

Matter of Howard, 9 Wallace, 175;

Brooks v. Gibbons, 4 Paige (N. Y. Chancery) 373, page 377.

In the latter case, a suit was brought by complainant on behalf of himself and all other creditors against an Executrix and devisees of the decedent for the account of the estate and for the satisfaction of their debts out of the same. It appeared that a similar suit had been commenced against the defendants by other creditors, in which the usual decree had been made in favor of the complainants in that suit, and also for the benefit of all other creditors who might come in under the decree. The complainant in the present suit alleged that he had no knowledge of the proceedings in the former suit until after the expiration of the time limited by the Master for the creditors to come in and prove their debts and after the final decree. The Chancellor dismissed the Bill without costs and without prejudice to the rights of the complainant to intervene in the former proceeding and prove his debt under the former decree.

In the instant case, the Circuit Court of Appeals has held that the intervention after an interlocutory decree in favor of the plaintiffs was proper. Since the decision of the Circuit Court of Appeals

there has been no change in the situation of all the parties to the litigation. There has been no performance of any part of the original decree and the situation as to all the parties remains exactly the same as it has always been. The allowance of petitioner's motion will not in any way delay or hinder any of the plaintiffs in whose favor the decree now stands from enforcing the decree, and whatever defences the defendant may assert with reference to petitioner's application could not go to the merits of the main litigation, which have already been decided adversely to it, but only to the right of the petitioner to have the benefit of the interlocutory decree, which was rendered in favor, not only of the plaintiffs, but of all other stockholders of the Houston & Texas Central Railway Company similarly situated, of which the petitioner is one.

It is again to be noted that the interlocutory decree did not fix any time within which any person similarly situated must present his proofs so as to be entitled to the benefits of the decree, nor was anybody given notice by advertisement or otherwise by the Master or the plaintiffs, requiring persons similarly situated to present their proofs or be barred from sharing in the recovery, but the interlocutory decree stands now as when it was entered in favor of this petitioner as one of the persons represented in the action, and in fact a party plaintiff, though not so by name.

POINT II.

The relief sought for should be granted by this Court.

That the petitioner should obtain the benefits of the judgment in the case at bar without having to incur the expenses and delay necessarily involved in proving again exactly the same cause of action already proven by the complainants in this case, is evident from a consideration of Equity Rule 38, under which this action was brought. That rule is as follows:

“When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, one or more may sue or defend for the whole.”

As this case is now before this Court on *certiorari* and the District Court, therefore, divested of jurisdiction, it is apparent that the petitioner can obtain the relief asked only by application to this Court.

Intervention in United States Courts is controlled by Equity Rule 37, the latter part of which Rule is as follows:

“Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention but the intervention shall be in subordination to and in recognition of the priority of the main proceeding.”

This Court has express authority to grant the intervention prayed for, if it shall see fit to do so. This Court has already passed upon this matter

of intervention to final decree when the matter was pending in this Court upon appeal in the case of

Evens & Howard Brick Co. v. U. S., 224
U. S. 382,

where this Court issued its mandate that certain necessary steps be taken to make the organization of the defendants a legal one under the Anti-Trust Act. The United States, as plaintiff, filed the mandate in the District Court and asked an interlocutory decree giving the time fixed by the Supreme Court for the defendant to take steps necessary to make its organization legal. As a result of steps taken by the defendants to comply with said mandate the final decree was entered on March 2nd, 1914. This decree was objected to by the United States because of the insufficiency of the steps taken by the defendants for the purpose of complying with the mandate of the Supreme Court, and on March 27th, 1914, the United States appealed from said final decree. After this appeal petitions to be allowed to intervene were filed in the District Court on behalf of the Evens & Howard Fire Brick Company and others, all based on the ground that the petitioner would suffer great injury by the serious loss occasioned to their business as the result of said final decree. This was denied by the District Court on the ground that the Court was without jurisdiction because of the appeal taken by the United States. Thereupon the petitioners filed a petition in this Court praying leave to be allowed to intervene and asking a modification of said final decree. The petitioners were allowed to intervene and in 236 U. S., at page 199, it is said:

"The challenge by the United States of the right to hear the intervening petitioners is

without merit, since even although the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree in so far as it might operate prejudicially to their rights."

and also in 236 U. S., at page 211, in passing on the appeal taken by the petitioners from the decision of the District Court refusing them permission to intervene in the lower Court, this Court said:

"This appeal was taken from the order of the court refusing to allow an intervention on the ground that there was no jurisdiction to do so because as the result of a previous final decree and an appeal taken therefrom by the United States, the authority of the court over the subject matter was ended. In effect *the relief* which was sought to be accomplished by the intervention below *has been obtained as the result of an original petition for intervention here and our action this day taken thereon*. As those applying to intervene were not parties to the record, we are of the opinion that the Court below had no power to allow them to intervene under the circumstances which existed and its judgment refusing their application was therefore right."

The fact that petitioner was not the owner of the stock before the foreclosure proceedings, as a result of which the defendant improperly and illegally possessed itself of the shares of the reorganized Company is not a valid objection to petitioner's application. The Circuit Court of Appeals, in its opinion affirming the final judgment, stated that such an objection to intervention would be valid only in stockholders' suits in derivative actions on behalf of the corporation under Equity

Rule 27, while this action is a representative or class action under Equity Rule 38.

Bogert *v.* Southern Pacific Co., 244 Fed. Rep. 61, on p. 64.

POINT III.

This Court has power to modify the decree by directing that after affirmance upon the merits of the plaintiff's cause of action, that the matter shall be referred by the district court to a master to permit other stockholders similarly situated with the plaintiff who may be willing to come in and contribute to the expenses to prove their claims and directing for this purpose that reasonable notice of such hearing be given.

The following cases fully support this statement:

In *Trustees of Wabash & Erie Canal Co. v. Beers*, 2 Black, 450, one of the holders of a series of \$200,000 of bonds on a certain portion of the Erie Canal brought an action to establish the priority of his bonds over other liens subsequently authorized by legislative enactment. This Court held that the entire issue of \$200,000 was a first lien and *of its own volition remanded the case with directions to refer it to a master to ascertain who the other bondholders were and to notify them to come in and share in the fruits of the decree on paying their proportion of its expense.* At page 457, the Court said:

"But plaintiff has brought his suit in behalf of himself and other bondholders of the

same class. The record affords strong reason to believe that the other one hundred and ninety-eight bonds of the same issue, are outstanding, with arrears of interest unpaid to the same extent as plaintiffs, *yet the decree makes no provision for them. This we think is error.*

"The bill in this case must be treated as in the nature of a creditor's bill, although not strictly of that class. The decree should declare the equality of lien of all these bondholders with plaintiff, and should provide for them the same relief which it gives to him. And the case should be referred to a master to ascertain who these bondholders are, about which we presume there will be little difficulty, and to notify them to come in and share in the fruits of the decree, on paying their proportion of its expense.

"For this purpose the case is remanded to the Circuit Court, with instructions to proceed in accordance with this opinion."

In *Johnson v. Waters*, 111 U. S. 640, the decree in a class case had been entered without giving any opportunity to persons similarly situated to intervene in the action and this Court modified the decree of the Court below and provided that the case should be referred to a Master who should give three months' public notice by advertisement to all creditors to appear before him and to establish their debts. At page 673 it is said:

*"We think that the latter part of the decree ought to be modified. The bill was filed by William Gay in behalf of himself and of all others, creditors of Oliver J. Morgan, * * * who shall come in and seek relief by and contribute to the expense of this suit.' In other words, it is a creditor's bill filed on behalf of the complainant and of all other creditors that choose to come in and share*

the expenses, for the purpose of securing the due administration and application of a trust fund, namely, the estate belonging to the succession of Oliver J. Morgan, deceased. On such a bill it is the usual and correct course to open a reference in the master's office and to give other creditors, having valid claims against the fund, an opportunity to come in and have the benefit of the decree."

In *Continental Trust Co. et al. v. Toledo, St. L. & K. C. R. Co.*, 82 Federal, at page 646, it is said by Taft, J.:

"The motion for an order requiring the Master in the creditor's suit to advertise the hearing of claims against the railroad company, and fixing the time of their presentation in his office, and the time for objections to the same, in accordance with the usual practice in a proceeding by general creditors' bill, is granted. The order ought to have been made at a much earlier time in the proceedings, but it is not too late now. Such a course is expressly approved by the Supreme Court of the United States in Trustees v. Beers, 2 Black, 457; In re Howard, 9 Wall. 175; Johnson v. Waters, 111 U. S. 674, 4 Supp. Ct. 619; Coal Co. v. McCreery, 141 U. S. 476, 12 Sup. Ct. 28. The proper course to be taken is described in 2 Daniell, Ch. Prac. (Eng. Ed. 1837-40) 854."

Also see

Matter of Howard, 9 Wallace 175.

Martin v. Rainwater, 56 Fed. 7, 10-11.

POINT IV.

IT IS RESPECTFULLY SUBMITTED that the petitioner, by an order of this Court, should be given an opportunity to prove before a Master his ownership of said additional eight hundred shares

of stock and thereupon that the judgment should be amended so as to give him the same relief as to said eight hundred shares of stock as is given by the judgment herein to the petitioner and other owners of stock of said Houston & Texas Central Railway Co. or that petitioner be given permission to apply to the District Court for the Eastern District of New York for leave to prove the ownership of said eight hundred shares of stock and for the amendment of the judgment herein so as to give him the same relief as to said eight hundred shares of stock as is given by the judgment herein to the petitioner and other owners of stock of said Houston & Texas Central Railway Company or in the alternative that if the aforesaid relief is refused that this Court, in case it sustains the right of the plaintiff to the relief asked for, shall modify the decree of the Court below by directing that the action shall be referred to a master and that three months' public advertisement or such other suitable notice as to this Honorable Court shall seem proper, be given to all stockholders similarly situated with plaintiff, to appear before said Master, and that the District Court be directed to enter judgment for such stockholders as shall prove their claims or shall prove the ownership of additional stock of the Houston & Texas Central Railway Company to that which they may have already proven in the case at bar, in the same manner as judgment has been heretofore entered in favor of the plaintiffs herein upon such intervening stockholders contributing their share of the expenses of this petition.

Respectfully submitted,

NORBERT HEINSHEIMER,
Attorney for Petitioner, Albert M. Polack.

Supreme Court of the United States.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

AGAINST

HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action; HENRY FITCH and RUSSELL H. LANDALE, as Supervisors of Committee of Stockholders; SARA ROSENFELD and ROSETTA COHN, as Executrices under the Last Will and Testament of Charles Minzensheimer and Michael Gernsheim,
Plaintiffs-Respondents.

No. 305.
October
Term,
1918.

IN THE MATTER

OF

The Application of ALBERT M. POLACK to be made a party to the action in this Court and for Amendment of the judgment herein so as to include him in its benefits, or in the alternative for a modification of the judgment in case the plaintiff's cause of action is affirmed,

Intervenor.

Southern Pacific Company, the defendant in the above entitled action, for answer to the petition of Albert M. Polack, alleges as follows:

I. It denies that the petitioner is a stockholder of the Houston & Texas Railway Company (hereinafter called Railway Company) similarly situated to the plaintiffs in the action at bar.

It alleges that, although at the present time the petitioner apparently is a stockholder of the Railway Company, it affirmatively appears that he did not acquire the stock until December, 1916, and more than two months after the final decree was entered. It further alleges, upon information and belief, that all of the said four hundred shares of stock of which the petitioner claims to be the owner were purchased by him at a sale at public auction conducted by A. Muller & Company on the 20th day of December, 1916, in the Borough of Manhattan, City of New York, said sale being had in the interest of Beverley R. Robinson, the Trustee in Bankruptcy, and that all of said shares were purchased at the price of \$65.16, which price included the sales fee and necessary stamps.

In answer to the petition of the Corn Exchange Bank for similar relief heretofore filed herein, being No. 773, October Term, 1917, the details of the various litigations and many other pertinent matters referred to in the record in the case at bar are disclosed, and for brevity this defendant refers to its answer to said petition and prays this Court to consider it as a part hereof.

II. The record shows that Judge Hough said in the Circuit Court of Appeals, 244 Fed. Rep. 61 (66), after discussing whether the plaintiffs had an action at law, as follows:

"It follows that the present decision holds in substance that there is no remedy at law for these plaintiffs; that equity is the only jurisdiction for them, and that twenty-five years of failure to discover an always existing

cause of action, based on the facts of almost public notoriety, does not constitute laches, in the absence of silence, inaction, or acquiescence by plaintiffs; or loss of advantages or change of situation caused or contributed to by plaintiffs on defendant's part."

It is apparent, therefore, that as petitioner was not active in protecting his rights, that it might well be that the court would hold that his failure to act constituted such silence, inaction and acquiescence as to bar any remedy of recovery. Defendant is entitled to its day in Court in regard to such defense.

III. Defendant deems it proper to make specific answer to the allegations contained in the petition, though many of them have been already replied to in its answer to the petition of the Corn Exchange Bank, in order that the record herein may be full and complete, and for answer thereto it alleges as follows:

FIRST: The defendant has no knowledge of the allegations contained in Article First of the petition except it admits the purchase on December 20, 1916, as hereinbefore set forth.

SECOND: It alleges that the allegations contained in Article Third of the petition do not fully or correctly set forth the nature of the action, and the defendant begs leave to refer to the record in the case at bar for the full and correct statement thereof. It alleges that the petitioner acquired the four hundred shares of stock subject to all the defenses set forth by the petitioner in its answer filed to the bill of complaint.

THIRD: It denies the allegations contained in Paragraph Fourth of the petition, and in answer to the various allegations to the bill incorporated by reference therein, begs leave to refer to the answer filed to the same.

FOURTH: It refers to the record in the case at bar for the details of the proceedings and of the provisions of the interlocutory decree, final decree and of the appeal taken to the Circuit Court of Appeals from such final decree and of the application for, and the granting of, the writ of *certiorari* by this court. It denies that the shares of stock by the judgment decreed to be held in trust are of a value in excess of \$350 a share, and denies that the petitioner will be entitled to receive upon the affirmance of the decree of the District Court the sum of \$140,000, or any sum whatever. It denies that your petitioner and his assignors are similarly situated to the plaintiffs in this suit, and denies that the petitioner is entitled to any of the benefits, advantages, or awards as in said decree provided. As to the other allegations contained in Paragraphs Fifth, Sixth, Eighth, Ninth, and Thirteenth of the petition, it denies each and every of them.

FIFTH: It has no knowledge of the allegations contained in Articles Seventh, Tenth, and Eleventh of the petition.

SIXTH: It alleges that on or about September 12, 1917, the petitioner made a motion in the District Court of the United States for the Eastern District of New York upon a petition, a copy of which is annexed to his petition herein and marked Exhibit "A", and that under date of September 24th the District Judge before whom said motion was

made handed down a memorandum, a copy of which is annexed to the petition herein marked Exhibit "B". It has no knowledge whether said motion was made immediately after the petitioner was advised of the pendency of this action and alleges that all the steps and proceedings taken in connection with the reorganization of the Railway Company were advertised and were matters of common knowledge and that the various litigations taken on behalf of stockholders referred to in the record herein were well known and easily ascertainable.

SEVENTH: Defendant is advised that the allegations contained in Article Fourteenth of the petition, except that as to no previous application having been made, are conclusions of law, and that it is not called upon to answer the same.

IV. Defendant alleges that the petitioner is not similarly situated to the plaintiffs, and that justice and equity requires petitioner should be compelled to duly prove his cause of action, and that it would be unfair and inequitable to permit him to intervene in the case at bar or to open the decree therein for his benefit if the same be affirmed by this court, because such action would deprive the defendant of good and valid defenses to said alleged cause of action, which defenses were held not open to it as against the plaintiffs by reason of the difference in the situation of the plaintiffs and the petitioner.

V. The case at bar is not one in which a fund is in the possession or under the control of the court, and is not one in which the decree entered

sought to distribute such fund to the exclusion of persons equitably entitled to share therein. The shares of stock which the defendant obtained under the Plan of Reorganization were never taken possession of by the court. Both the interlocutory and final decrees entered in the case at bar made provision for stockholders of the Old Company similarly situated.

WHEREFORE, the defendant, Southern Pacific Company, prays that the petition be denied in all respects and that the petitioner be not allowed to intervene herein or be granted any of the other relief prayed for.

SOUTHERN PACIFIC COMPANY,
by

HUGH NEILL,
Secretary,
Defendant-Appellant.

ARTHUR H. VAN BRUNT,
LEWIS H. FREEDMAN,
Counsel for Defendant-Appellant,
No. 54 Wall Street,
New York City, N. Y.

STATE OF NEW YORK, }
County of New York, } ss.:

HUGH NEILL, being duly sworn, deposes and says that he is the Secretary of Southern Pacific Company, the defendant-appellant in the above-entitled cause; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information

and belief, and that as to those matters he believes it to be true.

HUGH NEILL.

Sworn to before me this 5th }
day of October, 1918.

THOMAS F. DOUGHERTY,

[NOTARIAL SEAL.] Notary Public No. 104,
New York County.

To NORBERT HEINSHEIMER,

Attorney for Petitioner,

No. 165 Broadway, New York City, N. Y.

H. SNOWDEN MARSHALL, Esq.,

No. 61 Broadway, New York City, N. Y.

A. J. DITTENHOEFER, Esq.,

32 Broadway, New York City, N. Y.

DUDLEY F. PHELPS, Esq.,

32 Broadway, New York City, N. Y.

Attorneys for Plaintiffs-Respondents.

Supreme Court of the United States.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

against

HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action; HENRY FITCH and RUSSELL H. LANDALE, as Survivors of Committee of Stockholders; SARA ROSENFELD and ROSETTA COHN, as Executrices under the Last Will and Testament of Charles Minzensheimer and Michael Gernsheim,

Plaintiffs-Respondents.

No. ~~779~~ 305
October
Term,
1918

In the Matter of the Application of FERGUS REID, for the Amendment of the judgment herein or for leave to apply to the District Court for the amendment of the judgment or in the alternative for modification of the judgment in case the plaintiff's cause of action is affirmed.

Intervener.

Your Petitioner, FERGUS REID, a resident of the City, County and State of New York, praying for the amendment of the judgment herein, or for

- 4 leave to apply to the District Court for the Eastern District of New York for the amendment of the judgment herein, or in the alternative that this Court, in case it sustain the right of the plaintiffs to the relief asked for, shall modify the decree of the Court below by directing that the action shall be referred to a Master, and that three months of public advertisement, or such other suitable notice as to this Honorable Court shall seem proper, be given to all the stockholders similarly situated with plaintiffs to appear before said Master and establish their claims against the defendant and that the District Court be directed to enter judgment for such stockholders as shall prove their claims, or as shall prove the ownership of additional stock of the Houston & Texas Central Railway Company beyond that which they may have already proven in the case at bar, in the same manner as judgment has been entered in favor of the plaintiffs herein upon their contributing their share of the expenses of this litigation and petition, respectfully represents:
- 5

- FIRST.—On information and belief, this action is an action instituted by certain minority stockholders of the Houston & Texas Central Railway Company, suing on behalf of themselves and all other stockholders similarly situated who should come in and contribute to the expense of the action, to establish a resulting trust in favor of said stockholders to certain shares of stock of the Houston & Texas Central Railroad Company, which shares of stock it was alleged the said defendant, Southern Pacific Company had acquired and now holds in trust for said plaintiffs. The action was duly tried before the District Court of the Eastern District of New York and resulted in favor of plain-
- 6

tiffs and on the 13th day of December, 1915, an 7
 interlocutory decree was entered herein in which,
 among other things, it was decreed: "That the de-
 fendant, Southern Pacific Company, in the year
 1889, secured and still has in its possession and un-
 der its control, one hundred thousand (100,000)
 shares of the par or face value of ten million (\$10,-
 000,000) dollars, of the common stock of the Hous-
 ton & Texas Central Railroad Company, a corpora-
 tion organized and existing under the laws of the
 State of Texas. That the total outstanding capital
 stock of the Houston & Texas Central Railway
 Company was seventy-seven thousand, two hun- 8
 dred and sixty-nine (77,269) shares, and the said
 defendant, Southern Pacific Company, now has in
 its possession and holds (unless pledged subse-
 quent to receipt), for the benefit of the complain-
 ants and the other stockholders of the Houston &
 Texas Central Railway Company, respectively,
 who may come in and contribute to the expenses
 of this action, stock of the Houston & Texas Cen-
 tral Railroad Company, in the following propor-
 tions: For each seventy-seven thousand two hun-
 dred and sixty-nine hundred thousandth of a
 share (.77269) of the stock of the Houston & Texas
 Central Railway Company, held by the complain-
 ants, and by the other stockholders of the said 9
 Railway Company who may come in and con-
 tribute to the expenses of this action, respectively,
 the defendant, Southern Pacific Company has in
 its possession and hold (unless pledged subse-
 quently), for said complainant and other stock-
 holders, one share of the capital stock of the Hous-
 ton & Texas Central Railroad Company. * * *
 That any party may hereafter apply, upon notice
 to the other parties hereto for such further order
 and direction as may be proper to carry out the

- 10 purposes of this decree, and to be added at the foot hereof." No part of said judgment has been complied with by said Southern Pacific Company.

SECOND.—No notice of said judgment was given to petitioner by publication or otherwise, and petitioner had no knowledge of such judgment until August, 1918, as hereinafter stated, and petitioner avers, on information and belief, that no notice of said judgment was ordered to be given to him.

- On information and belief, the shares of stock so decreed to be held in trust are now of a value in excess of \$350. per share and if petitioner is
11 granted the relief asked for he will be entitled to receive from said Southern Pacific Company stock of a value in excess of \$70,000.

THIRD.—On information and belief, after said interlocutory decree had been rendered, Sarah Rosenfeld and Rosetta Cohen as Executrices under the Last Will and Testament of Charles Minzenheimer and Michael Gernsheim, who obtained knowledge thereof, were upon application permitted to intervene as minority stockholders who had interests similar to those of the plaintiffs.

- 12 FOURTH.—On information and belief, that an appeal from said final judgment was duly taken by the defendant, now appellant herein, to the Circuit Court of Appeals for the Second District, and said judgment was in all respects affirmed. Thereupon said defendant, Southern Pacific Company made application for a writ of certiorari for the review of such judgment by this Honorable Court, which writ was granted on or about the 23rd day of November, 1917, and said action is now pending for hearing before this court and

by reason thereof the District Court has no jurisdiction of said cause and has no power to grant the relief prayed for herein, viz.: to permit the intervention of petitioner in this cause and amend the judgment as herein asked for, except by permission of this Court, which now has exclusive jurisdiction of said cause. Petitioner further avers that another stockholder after the affirmance by the Circuit Court of Appeals, made application to the District Court to be permitted to intervene in this action, but was refused such permission on the ground that the certiorari removed the cause from its jurisdiction. 13

FIFTH.—In or about the year 1895, the petitioner was engaged in the business of stock broker and was in the habit, among other things, of purchasing low priced securities and holding them as an investment for a number of years in the hopes that they would advance in value. That in or about the year 1895 the petitioner purchased for said purpose 200 shares of the stock of the Houston & Texas Central Railway Company. That at the time of acquiring said stock petitioner had no knowledge of the facts hereinabove set out with regard to the affairs of said company and has never had any knowledge of said facts until the said month of August, 1918. Shortly after purchasing said stock and from time to time petitioner was informed that the affairs of the company were in bad shape and that litigation was pending which had been instituted by certain stockholders in behalf of all other stockholders, but understood that such litigation had been unsuccessful until he obtained knowledge in August, 1918, of the successful termination of this suit. Subsequent to purchasing said 14 15

- 16 stock the price of said stock declined and trading in said stock stopped. Since said date and down to the present time petitioner has held said stock and is now a stockholder in the said Houston & Texas Central Railway Company.

- SIXTH.—On information and belief, that at and shortly before the time when he acquired title to his said stock, in or about the year 1895, that the stockholders of said Houston & Texas Central Railway Company felt that a proposed reorganization of the Houston & Texas Central Railway Company by means of a consent by the
- 17 majority stockholders to a decree in a foreclosure action instituted by certain bondholders, which was in process of being carried out, was in violation of the rights of the minority stockholders, and was entirely for the benefit of the defendant-appellant, the Southern Pacific Company. After efforts made out of Court had failed to secure an abandonment of such proposed reorganization, litigation in behalf of the minority stockholders was begun by Stephen W. Carey and other stockholders of said Houston & Texas Central Railway Company, having for its
- 18 object the prevention of the carrying out of said foreclosure action and the entering of said consent decree. In or about the month of December, 1889, an injunction restraining the prosecution of said foreclosure action and the entering of said consent decree, was duly issued in said action, but the said injunction was set aside and the case was tried in the year 1892, and decided against the plaintiffs, and upon appeal to the Supreme Court of the United States, said decision was affirmed in the year 1896.

SEVENTH.—Petitioner has had no knowledge of any of the proceedings referred to in the complaint herein and has had no knowledge of the action herein until after the affirmance of the decree herein by the Circuit Court of Appeals, in the summer of 1917, and the application to this Court for a writ of certiorari, his first knowledge having been derived in the month of August, 1918, when he received information of the present action and of the affirmance of the decree herein by the Circuit Court of Appeals and of the pendency of the writ of certiorari to this Court, when he at once took steps to employ attorneys to make the proper application to the Court to prove his ownership of said 200 shares of stock and to obtain intervention in this action.

EIGHTH.—That no other or previous application has been made to this Court for the relief prayed for herein and no application therefor has been made to the District Court because by reason of the writ of certiorari granted by this Court, said District Court is and has been since petitioner had knowledge of the matters set forth herein, without jurisdiction of said cause, and has no power by reason thereof to grant the relief asked for herein.

NINTH.—That if the relief herein asked for is not granted and petitioner is forced to institute a new action to obtain a judgment directing the turning over to him of said stock so held in trust for him, much time of a trial court will be consumed in proving petitioner's said cause of action and petitioner will be put to large and unnecessary expense in making proof of the same facts which have already been proven in this action.

- 22 WHEREFORE, petitioner prays an order of this Honorable Court to permit him to intervene and upon establishing the truth of the matters set forth in this petition that it be adjudged that the petitioner shall be made a party to this action and included in the judgment herein upon such terms and conditions as to the payment of the costs of this action and attorneys' fees as the other parties to the action are required to pay or such as to this Court may seem just and proper and Petitioner further prays in the alternative, if such relief be refused by this Court, that permission be given it to make application to the District Court
- 23 for the Eastern District of New York for leave to intervene in this action upon the terms and conditions as to costs and counsel fees imposed upon other interveners, or upon such terms and conditions as to costs and counsel fees as may seem to that court to be just and proper and that the said District Court be granted permission by this Honorable Court upon finding the facts set forth in Petitioner's Petition to be true, to admit Petitioner as a party thereto upon such terms and conditions as to costs and counsel fees as shall be proper; and that the said District Court be granted permission to amend the judgment herein so
- 24 as to add thereto a provision for the benefit of Petitioner similar to that now contained in said judgment in favor of other stockholders of said Houston & Texas Central Railway Company; and petitioner further prays in the alternative that if the aforesaid relief is refused that this Court, in case it sustains the right of the plaintiffs to the relief asked for, shall modify the decree of the Court below by directing that the action shall be referred to a master and that three months' public advertisement or such other suitable notice as

to this Honorable Court shall seem proper be
 given to all stockholders similarly situated with
 plaintiffs to appear before said master and estab-
 lish their claims against the defendant and that
 the District Court be directed to enter judgment
 for such stockholders as shall prove such claims
 in the same manner that judgment has been en-
 tered in favor of the plaintiffs herein, upon their
 contributing their share of the expenses of this
 petition. 25

The Petitioner further prays for such other
 and further relief as to the Court may seem just
 or proper.

FERGUS REID, 26
 Petitioner.

STATE OF NEW YORK, }
County of New York, } ss.:

FERGUS REID, being duly sworn, deposes and
 says, that he is the Petitioner named in the with-
 in Petition, and that he has read the foregoing
 petition and knows the contents thereof and that
 the same is true to his own knowledge except as
 to the matters therein alleged upon information
 and belief, and that as to those matters he be-
 lieves it to be true. 27

FERGUS REID.

Sworn to before me this 10th }
 day of September, 1918. }

GEORGE MAUER,
 Notary Public,
 Kings County.

SEAL

Certificate filed in New York County. No. 148.

28

SUPREME COURT OF THE
UNITED STATES.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

against

29 HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action; HENRY FITCH and RUSSELL H. LANDALE, as Survivors of Committee of Stockholders; SARA ROSENFELD and ROSETTA COHN, as Executrices under the Last Will and Testament of Charles Minzensheimer and Michael Gernsheim,

Plaintiffs-Respondents.

No. ~~774~~ 305-
October
Term,
1918

30 In the Matter of the Application of FERGUS REID, for the Amendment of the judgment herein or for leave to apply to the District Court for the amendment of the judgment or in the alternative for modification of the judgment in case the plaintiff's cause of action is affirmed.

Intervener.

SIRS:

PLEASE TAKE NOTICE that we shall on or before the 7th day of October, 1918, file in the office of

the Clerk of the Supreme Court of the United States, the foregoing petition for leave to intervene in the above entitled case or for permission to apply to the District Court for the Eastern District of New York for permission to intervene in said case and to amend the judgment herein and will also file a brief in the above entitled case, a copy of which brief will be served upon you more than ten days prior to the 7th day of October, 1918, and that we shall on the 7th day of October, 1918, being a motion day of the October Term, upon the opening of Court, or as soon thereafter as counsel can be heard, at the Court room of the Supreme Court of the United States, move that the Petitioner be permitted to intervene in the above-entitled cause, or given permission to apply to the District Court for the Eastern District of New York for permission to intervene in said cause, and for the amendment of said judgment as in the Petition prayed for, or in the alternative that if the aforesaid relief is refused that this Court, in case it sustain the right of the plaintiffs to the relief asked for shall modify the decree of the Court below by directing that the action shall be referred to a master and that three months' public advertisement or such other suitable notice as to this Honorable Court shall seem proper, be given to all the stockholders similarly situated with plaintiffs, to appear before said master and establish their claims against the defendant, and that the District Court be directed to enter judgment for such stockholders as shall prove such claims in the same manner that judgment has been entered in favor of the plaintiffs

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- 34 herein upon their contributing their share of the expenses of this petition.

Dated, September 10, 1918.

SCOTT, GERARD & BOWERS,
Attorneys for Fergus Reid, Petitioner,
Number 46 Cedar Street,
Borough of Manhattan,
New York City.

To:—

LEWIS H. FREEDMAN, Esq.,
54 Wall Street,
New York City.

- 35 ARTHUR H. VAN BRUNT, Esq.,
54 Wall Street,
New York City.
Counsel for the above-named Defendant-Appellant; and

H. SNOWDEN MARSHALL, Esq.,
61 Broadway,
New York City.

A. J. DITTENHOEFER, Esq.,
32 Broadway,
New York City, and

- 36 DUDLEY F. PHELPS, Esq.,
32 Broadway,
New York City.
Attorneys for Plaintiffs-Respondents.

13

Supreme Court of the United States.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

against

HENRY L. BOGERT, TOWNSEND LAWRENCE
and ANITA LAWRENCE, as Executors
under the Last Will and Testament of
Walter B. Lawrence, deceased, suing on
behalf of themselves and other stock-
holders of the Houston & Texas Central
Railway Company similarly situated
who may come in and contribute to the
expenses of this action, HENRY FITCH
and RUSSELL H. LANDALE, as Survivors
of Committee of stockholders, SARA
ROSENFELD and ROSETTA COHN, as Ex-
ecutrices under the Last Will and Tes-
tament of Charles Minzensheimer and
Michael Gernsheim,
Plaintiffs-Respondents,

No. 305.
October
Term,
1918.

In the Matter of the Application of FERGUS
REID to be made party to the action in
this court or given permission to apply
to the District Court to be made party
and for amendment of the judgment
so as to include FERGUS REID in its bene-
fits or in the alternative for a modifica-
tion of the judgment in case the plain-
tiff's cause of action is affirmed.

Intervener.

Brief in Support of Petition of Fergus Reid to Intervene, &c.

We are not unmindful that this petition is an
unusual one to make to this Court even though

the authorities hereinafter cited clearly support the right of this Court to grant the relief asked for.

We have filed this petition because in this way only can the petitioner obtain that relief to which he is entitled under the very extraordinary facts existing in the case at bar, without resorting to an expensive and lengthy proceeding in equity in which the time of the Courts and the money of our client would be expended in establishing the same general cause of action as has already been established in the case at bar.

This action was brought by a minority stockholder of the now defunct Houston & Texas Central Railway Company suing in behalf of himself and all other stockholders thereof similarly situated, who should come in and contribute to the expenses of the action. The action was in equity against the Southern Pacific Company to establish a resulting trust in and to certain shares of stock of the Houston & Texas Central Railroad Company, which the Southern Pacific Company had acquired and now holds as a result of a very vicious betrayal of the rights of the minority stockholders of said Houston & Texas Railway Company by the majority stockholder thereof, which was a company controlled by the defendant and which acted in its interest. Of all the matters set out in the complaint the petitioner was ignorant (Petition, Par. 7). The plaintiff has been successful in said action and an interlocutory decree was entered herein upon the 13th day of December, 1915, in which it was decreed that the defendant, Southern Pacific Company in the year 1889 secured and still has in its possession and holds for the benefit of the complainants and

other stockholders of the Houston & Texas Central Railway Company, respectively, who may come in and contribute to the expenses of this action, stock of the Houston & Texas Central Railroad Company in the following proportion, viz.: One (1) share of stock of the Houston & Texas Central Railroad Company for every .77469 shares of stock of the Houston & Texas Central Railway Company (par. 41).

*Although the authorities hold that it is the duty of the Court under such circumstances to direct a reference and give reasonable notice to other stockholders of their right to be made a party upon proving their ownership of stock (See cases cited under Point II *infra*), no notice of this decree was given or ordered to be given to petitioner by publication or otherwise. As a result thereof petitioner, who owns two hundred shares of the stock of said Houston & Texas Central Railway Company, which stock could upon the payment of a small sum of money be exchanged under said decree for stock of the Houston & Texas Central Railroad Company worth upwards of \$70,000 (Par. 2), had no knowledge of said decree until by the merest chance he heard of it after the writ of certiorari herein had been granted by this Court.*

A couple of minority stockholders who were more fortunate than petitioner, in some way obtained knowledge of said decree before final judgment and made application to be made parties herein and were duly admitted by the District Court as parties and made proof of their stock ownership, and were included in the final judgment subsequently entered in this action on the 5th day of October, 1916 (Par. 3). This judgment

found that all the allegations of the petitioner were true and that the Southern Pacific Company held said stock in trust, as aforesaid (Par. 1).

Thereupon an appeal was taken to the Circuit Court of Appeals for the Second Circuit and was on or about the 2nd day of July, 1917, in all respects affirmed, and shortly thereafter application was made to this court for a writ of certiorari and on or about the 23rd day of November, 1917, a writ of certiorari was duly granted by this Court and the action is now pending for hearing before this Court.

The granting of the writ of certiorari herein took this action entirely out of the jurisdiction of the lower Court (*Evens & Howard Fire Brick Co. v. U. S.* 236 U. S., at 211), and that Court is, therefore, now powerless to permit the petitioner to intervene and as a matter of fact, as is alleged in said petition, said District Court has refused to permit another stockholder to intervene for the purpose of establishing the very same right that petitioner herein asks for upon the sole ground that it ceased to have jurisdiction to permit intervention as soon as the application for a writ of certiorari had been made (Par. 4).

Unless, therefore, this Court grants the relief asked for, petitioner will not be able to intervene and share his part of the expenses of this litigation and share in the relief which the Court decreed for his benefit as a stockholder similarly situated with the plaintiff.

In such case, if he can get any relief at all, it will be only after having again tried out the entire cause of action upon its merits in a new action which he might be able to institute. This

would certainly involve much expense and great delay. This application will be heard a considerable time before the main case is argued, and long before that time, plaintiff can have proven the truth of the matters set out in its petition, and have been made a party to share in the benefits of the judgment if it shall be affirmed by this Court, or in case of reversal, bear its share of the costs of this litigation.

Since the decrees referred to above, there has been no change in the situation of all the parties to the litigation. The Southern Pacific Company has not complied with the decree by turning over any of said stock and there has been no performance of any part of the original decree and the situation of all the parties hereto remains exactly the same as it has always been.

POINT I.

This Court has power to permit the intervention asked.

That the petitioner should obtain the benefits of the judgment in the case at bar without having to incur the expenses and delay necessary to again prove the same cause of action already proven in the case at bar, seems clear from the wording of Equity Rule 38, under which the action was brought.

That Rule reads:

“When the question is one of common or general interest to many persons constitut-

ing a class so numerous as to make it impracticable to bring them all before the Court, one or more may sue or defend for the whole."

As the case is before this Court on certiorari and the Trial Court, therefore, divested of further jurisdiction, it is apparent that the petitioner can only obtain this relief by application to this Court.

Equity Rule 37 controls the question of intervention in the United States Courts. The latter part of that rule reads:

"Anyone claiming an interest in the litigation may *at any time* be permitted to assert his right by intervention but the intervention shall be in subordination to and in recognition of the priority of the main proceeding."

It is apparent from this that this Court has express authority to grant the intervention prayed for, if it shall see fit to do so.

Possibly the leading case upon this subject in this Court is the case of *Evens & Howard Brick Co. v. United States*, 224 U. S., 383, where this court issued its mandate that certain necessary steps be taken to make the organization of the defendants a legal one under the Anti-Trust Act. The United States, as plaintiff, filed the mandate in the District Court and asked an interlocutory decree giving the time fixed by the Supreme Court for the defendant to take steps necessary to make its organization legal. As a result of steps taken by the defendants to comply with said mandate the final decree was entered on March 2nd, 1914. This decree was objected to by the United States

because of the insufficiency of the steps taken by the defendants for the purpose of complying with the mandate of the Supreme Court and on March 27th, 1914, the United States appealed from said final decree. After this appeal petitions to be allowed to intervene were filed in the District Court on behalf of the Evens & Howard Fire Brick Company and others all based on the ground that the petitioner would suffer great injury by the serious loss occasioned to their business as the result of said final decree. This was denied by the District Court on the ground that the Court was without jurisdiction because of the appeal taken by the United States. Thereupon the petitioners filed a petition in this Court praying leave to be allowed to intervene and asking a modification of said final decree. The petitioners were allowed to intervene and in 236 U. S., at 199, it is said:

“The challenge by the United States of the right to hear the intervening petitioners is without merit, since *even although the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree* in so far as it might operate prejudicially to their rights.”

and also in 236 U. S., at page 211, in passing on the appeal taken by the petitioners from the decision of the District Court refusing them permission to intervene in the lower Court, this Court said:

“This appeal was taken from the order of the court refusing to allow an intervention on the ground that there was no jurisdiction to do so because as the result of a previous final decree and an appeal taken therefrom

by the United States, the authority of the court over the subject-matter was ended. In effect *the relief* which was sought to be accomplished by the intervention below *has been obtained as the result of an original petition for intervention here and our action this day taken thereon.* As those applying to intervene were not parties to the record, we are of the opinion that the court below had no power to allow them to intervene under the circumstances which existed and its judgment refusing their application was therefore right."

In *United States v. Northern Securities Company*, 128 Federal 808, an application to intervene was made after the final decree had been affirmed by the Supreme Court of the United States, the application being made in the lower Court. At page 810, it is said:

"Applications for leave to intervene in a case after the entry of a final decree are very unusual. They are never granted as a matter of course, and, owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted *unless it is necessary to do so to preserve some right which cannot otherwise be protected, or to avoid some complication that is liable to arise.*"

This case distinctly recognizes the right to intervene after final decree and after an appeal to the Appellate Court has been decided.

In *Foster*, Federal Practice, Section 259, p. 833, it is said:

"A petition of intervention may be filed *at any stage of the cause, even after a final decree.*"

In *Brooks v. Gibbons*, 4 Paige, 373, a suit was brought by complainant on behalf of himself and all other creditors against an Executrix and devisees of the decedent for the account of the estate and for the satisfaction of their debts out of the same. It appeared that a similar suit had been commenced against the defendants by other creditors, in which the usual decree had been made in favor of the complainants in that suit, and also for the benefit of all other creditors who might come in under the decree. The complainant alleged that he had no knowledge of the proceedings in the former suit until after the expiration of the time limited by the Master for the creditors to come in and prove their debts and after the final decree. The Chancellor dismissed the Bill without costs and without prejudice to the rights of the complainant to intervene in the former proceeding and prove his debt under the former decree.

We submit, furthermore, that as a matter of law, the petitioner was really a party complainant in this action at all times by representation and that therefore this motion is not a question of bringing in a new party or adding a new complainant, but is merely to add the petitioner's name to the record so that there can be no question of his taking the benefit of the decree already entered in his favor.

A very valuable discussion of the effect of the decree in class suits will be found in *Streets Federal Equity Practice*, Vol. 1, Ch. 12, Sec. 539, *et seq.* In Section 549 it is said:

"It has always been understood in the English Chancery, and apparently in the equity courts of this country, that the decree

in class suits is binding on all persons in interest whether they are actually before the court or not; at least this is so where the interest of those persons is properly represented before the court. Those who are actually before the court as plaintiffs or defendants are considered and treated as being the proper legal representatives of those who are absent but who are in like interest. The true class suit in fact supplies an instance of virtual representation. When the court once gets jurisdiction over the subject-matter, it will proceed to clean up every element of the controversy, as it affects each and every party in interest; and to this end all that is necessary is that the different persons in interest shall be before the court either in person or by representation. It is obvious that the court, before proceeding against parties who are such by representation only, will take care to see that all are properly and fairly represented. This has always been fully insisted on. Granting that the idea of proceeding against, or on behalf of, parties who are such by representation only is a valid one,—and that it is based on a sound principle of jurisprudence is obvious from the fact that in many cases justice could not otherwise be administered,—it follows that *a decree entered in a class suit must of necessity be valid and binding as to all. Those who are represented are concluded in the same degree and to the same extent as are those who are actually before the Court.* This is a rational and just conclusion, and it has the sanction of the established usage of the English chancery. *The jurisdiction of the court over the subject-matter enables the court to determine the rights of all persons to the property, provided only they are sufficiently represented before the court."*

One of the earliest cases (*Handford v. Storie*) is to be found in 2 Simon's and Stuart's Reports (in Chancery) 196, decided in 1825. In this case one holder of a debenture had filed a bill in behalf of himself and all other debenture holders against the maker thereof, praying for an account and payment. After the institution of his suit and while it was pending he sold his own debenture to the maker upon advantageous terms and thereupon consented that the bill be dismissed before any decree was made upon it, and the bill was accordingly dismissed. Subsequently another debenture holder, on behalf of himself and other debenture holders, filed a bill against the complainant in the former action, praying that such complainant re-pay to the Trustees the money he had received in order that it might be distributed under the trust deed. The Court held that where a plaintiff files a bill on behalf of himself and all other persons of the same class he retains the absolute dominion of the suit until the decree and may dismiss the bill at his pleasure; but after a decree he cannot deprive the other persons of the same class of the benefits of the decree; the Vice Chancellor saying in conclusion:

“The reason for the distinction is, that before Decree no other person of the class is bound to rely upon the diligence of him who has first instituted his Suit, but may file a Bill of his own; and that, *after a Decree, no second Suit is permitted.*”

In *Brinkerhoff v. Bostwick*, 99 N. Y. 185, the Court also held that in a representative or class action a judgment when taken was for the benefit of all the stockholders and the rights of the other stockholders or parties to the action by representation at once attach to the judgment. The Court said:

“In this case, therefore, it was not necessary that the other plaintiffs be joined as nominal plaintiffs. The suit could have gone to judgment without their presence as nominal plaintiffs and *the judgment would have been just as effectual and just as beneficial for them as if they had been actually named as parties plaintiffs.*”

POINT II.

This court has power to modify the decree by directing that after affirmance upon the merits of the plaintiff's cause of action, that the matter shall be referred by the district court to a master to permit other stockholders similarly situated with the plaintiff who may be willing to come in and contribute to the expenses to prove their claims and directing for this purpose that reasonable notice of such hearing be given.

The following cases fully support this statement:

In *Trustees of Wabash & Erie Canal Co. v. Beers*, 2 Black, 450, one of the holders of a series of \$200,000. of bonds on a certain portion of the Erie Canal brought an action to establish the priority of his bonds over other liens subsequently authorized by legislative enactment. This court held that the entire issue of \$200,000 was a first lien and *of its own volition remanded the case with directions to refer it to a master to ascertain who the other bondholders were and to notify them to come in and share in the fruits of the decree on paying their proportion of its expense.* At p. 457, the court said:

"But plaintiff has brought his suit in behalf of himself and other bondholders of the same class. The record affords strong reason to believe that the other one hundred and ninety-eight bonds of the same issue, are outstanding, with arrears of interest unpaid to the same extent as plaintiffs, yet the decree makes no provision for them. This we think is error.

"The bill in this case must be treated as in the nature of a creditor's bill, although not strictly of that class. The decree should declare the equality of lien of all these bondholders with plaintiff, and should provide for them the same relief which it gives to him. And the case should be referred to a master to ascertain who these bondholders are, about which we presume there will be little difficulty, and to notify them to come in and share in the fruits of the decree, on paying their proportion of its expense.

"For this purpose the case is remanded to the Circuit Court, with instructions to proceed in accordance with this opinion."

In *Johnson v. Waters*, 111 U. S. 640, the decree in a class case had been entered without giving any opportunity to persons similarly situated to intervene in the action and this Court modified the decree of the Court below and provided that the case should be referred to a Master who should give three months' public notice by advertisement to all creditors to appear before him and to establish their debts. At page 673 it is said:—

*"We think that the latter part of the decree ought to be modified. The bill was filed by William Gay in behalf of himself and of all others, creditors of Oliver J. Morgan,
* * * who shall come in and seek relief*

by and contribute to the expense of this suit.' In other words, it is a creditor's bill filed on behalf of the complainant and of all other creditors that choose to come in and share the expenses, for the purpose of securing the due administration and application of a trust fund, namely, the estate belonging to the succession of Oliver J. Morgan, deceased. On such a bill it is the usual and correct course to open a reference in the master's office and to give other creditors, having valid claims against the fund, an opportunity to come in and have the benefit of the decree.'

In *Continental Trust Co. et al. v. Toledo, St. L. & K. C. R. Co.*, 82 Federal, at page 646, it is said by Taft, J.:

"The motion for an order requiring the Master in the creditor's suit to advertise the hearing of claims against the railroad company, and fixing the time of their presentation in his office, and the time for objections to the same, in accordance with the usual practice in a proceeding by general creditors' bill, is granted. The order ought to have been made at a much earlier time in the proceedings, but it is not too late now. Such a course is expressly approved by the Supreme Court of the United States in Trustees v. Beers, 2 Black, 457; In re Howard, 9 Wall. 175; Johnson v. Waters, 111 U. S. 674, 4 Sup. Ct. 619; Coal Co. v. McCreery, 141 U. S. 476, 12 Sup. Ct. 28. The proper course to be taken is described in 2 Daniell, Ch. Prac. (Eng. Ed. 1837-40) 854."

Also see *Matter of Howard*, 9 Wallace 175.

Martin v. Rainwater, 56 Fed. 7, 10-11.

POINT III.

It is respectfully submitted that petitioner be made a party to this action, or given permission to apply to the District Court to be made a party and for amendment of the judgment so as to include petitioner in its benefits, or in the alternative, that if the aforesaid relief is refused, that this court, in case it sustain the right of the plaintiffs to the relief already adjudged them, shall modify the decree by directing that the action shall be referred to a master and that such notice as to this court shall seem proper be given to all stockholders similarly situated with plaintiffs to appear and establish their claims and that the District Court be directed to enter judgment for such stockholders as shall prove such claims in the same manner as the judgment has been heretofore entered in favor of the plaintiffs herein, upon such intervening stockholders contributing their share of the expenses of this petition.

Respectfully submitted,

SCOTT, GERARD & BOWERS,
Solicitors for Petitioner,
Fergus Reid.

FRANCIS M. SCOTT,
JAMES W. GERARD and
SPOTSWOOD D. BOWERS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

AGAINST

HENRY L. BOGERT, TOWNSEND LAW-
RENCE and ANITA LAWRENCE, as
Executors under the Last Will
and Testament of Walter B. Law-
rence, deceased, suing on behalf
of themselves and other stock-
holders of the Houston & Texas
Central Railway Company, simi-
larly situated, who may come in
and contribute to the expenses of
this action; HENRY FITCH and
RUSSELL H. LANDALE, as Super-
visors of Committee of Stock-
holders; SARA ROSENFELD and
ROSETTA COHN, as Executrices
under the Last Will and Testa-
ment of Charles Minzensheimer
and Michael Gernsheim,
Plaintiffs-Respondent.

No. 305.
October Term, 1918.

IN THE MATTER

OF

The Application of FERGUS REID for
the Amendment of the judgment
herein or for leave to apply to the
District Court for the amendment

of the judgment or in the alternative for modification of the judgment in case the plaintiff's cause of action is affirmed,

Intervener.

Southern Pacific Company, defendant in the above-entitled action, for answer generally to the petition of Fergus Reid, alleges as follows :

I. It denies that the petitioner is a stockholder of the Houston and Texas Central Railway Company (hereinafter for brevity called the " Railway Company ") similarly situated to the plaintiffs in the action at bar.

In support of such denial it alleges that it affirmatively appears in the petition that the petitioner is the owner of 200 shares of the stock of the Railway Company, and that he did not acquire the 200 shares of stock of which he claims to be the owner until 1895—over seven years after the happening of the events complained of and subsequent to the beginning of many of the litigations instituted on behalf of the Stockholders' Committee and others for the purpose of securing their fancied rights—hence the conclusion is irresistible that the petitioner acquired said stock for speculative purposes ; that said shares were purchased by him at a time when he conceived the Stockholders' Committee had gained some advantage in the litigations pursued by it, but further proceedings in the said action resulting adversely he took no action whatsoever to protect his rights in said stock, nor did he make any deposit with said Stockholders' Committee of said 200 shares and has remained absolutely inactive since such time.

The record in the case at bar shows that since 1889, one year after the entry of the foreclosure decree, and up to the present time, the Stockholders' Protective Committee of which

plaintiffs were members, were actively engaged in the prosecution of various litigations seeking to recover on behalf of themselves, and others similarly situated, for the alleged wrong which they fancied they had sustained.

In the answer to the petition of the Corn Exchange Bank for similar relief, heretofore filed by the same attorneys, which petition more fully discloses the situation, the details of such litigations and many other pertinent matters are disclosed, and for brevity this defendant refers to its answer heretofore to the petition of the Corn Exchange Bank and prays this Court to consider it as a part hereof.

II. In discussing the affirmative defenses the Circuit Court of Appeals in the case at bar, overruled the defense of laches upon the ground that the activities of the Stockholders' Committee in the suits instituted on their behalf and on behalf of the stockholders who had deposited their stock with said Committee were sufficient to show that those claiming through such committee had been at all times active in endeavoring to protect their rights though their proceedings had been brought upon a different theory than that which the Court concluded was involved in the case at bar.

It is significant that petitioner does not allege ignorance or lack of knowledge of the provisions of the Reorganization Agreement nor does he state that the terms thereof did not come to his attention so that the ground stated by the Circuit Court of Appeals for overruling the defense of laches in the suit at bar, to wit, that the plaintiffs had been actively pursuing a remedy, though upon an improper theory, does not apply to the stock on account of which the petitioner now seeks relief. In fact, it affirmatively appears that since 1895 he had been engaged in the business of stock broker and that in respect to this stock he has taken no steps whatsoever to enforce what Judge Hough designates "an always existing cause of action based on facts of almost public notoriety." It therefore follows that his silence, inaction and acquiescence do

constitute such laches as to bar him from any remedy or recovery or participation in the recovery had by plaintiffs in the action at bar in respect to stock not deposited with the Stockholders' Committee.

III. In the Circuit Court of Appeals Judge HUGH, after discussing whether or not the plaintiffs had a remedy at law, and if so, whether the Statute of Limitations would be an available defense to the alleged cause of action, states as follows (244 Fed. Rep., 61, (66)) :

"It follows that the present decision holds in substance that there is no remedy at law for these plaintiffs; that equity is the only jurisdiction for them, and that twenty-five years of failure to discover an always existing cause of action, based on the facts of almost public notoriety, does not constitute laches, in the absence of silence, inaction, or acquiescence by plaintiffs; or loss of advantages or change of situation caused or contributed to by plaintiffs on defendant's part."

It is apparent, therefore, that as petitioner was not active in protecting his rights, that it might well be that the court would hold that his failure to act constituted such silence, inaction and acquiescence as to bar any remedy of recovery. Defendant is entitled to its day in Court in regard to such defense.

IV. Defendant deems it proper to make specific answer to the allegations contained in the petition, though many of them have been already replied to in its answer to the petition of the Corn Exchange Bank, in order that the record herein may be full and complete, and for answer thereto it alleges as follows :

FIRST. It alleges that the allegations contained in Article "First" of the petition do not fully or correctly set forth the nature of the action, the relief stated, the proceedings had or the provisions of the interlocutory judgment attempted to be recited therein and begs leave to refer to the record in the

case at bar for a full and correct statement of each and every of said particulars.

SECOND. It alleges that it is immaterial whether petitioner had or had not knowledge of said judgment until after the decision of the Court of Appeals in the summer of 1917, and until August, 1918, and alleges that proper activity or inquiry on the part of the petitioner would have fully disclosed to him the exact situation and enabled him to take such steps as might be desirable and proper to protect his interests. It denies that the shares of stock of the Houston & Texas Central Railroad Company by said judgment decreed to be held in trust are of a value in excess of \$350 per share. Except as above alleged, explained or denied it has no knowledge of the allegations contained in article "Second" of the petition.

THIRD. The defendant alleges that the applications of the executrices of Charles Minzensheimer and of Michael Gernsheim were duly made to the United States District Court for the Eastern District of New York at a time when such court had jurisdiction of the action at bar and of the parties thereto, to wit, prior to the entry of final decree and that by direction of the court proof was duly taken as to the allegations contained in said petitions, the status of the petitioners, and the defenses in defendant's answer thereto, and said proofs were considered by the court and judicially passed upon prior to the making and entry of the order admitting said petitioners as parties defendant. Said order constituted a judicial determination of the status of petitioners at a time when the court had jurisdiction of the action.

FOURTH. The defendant admits that an appeal was taken from said final decree to the Circuit Court of Appeals and said decree was affirmed, Judge HOUGH dissenting in part from said affirmance, and that this Honorable Court granted a writ of *certiorari* on or about November 23, 1917, and that said action is now pending for hearing before this Court. It admits that application was made after affirmance by the Circuit Court

of Appeals to the District Court by a stockholder for leave to intervene as a party plaintiff and that such application was denied by the District Court. Except as above admitted or alleged, it has no knowledge of the allegation contained in article " Fourth " of the petition.

FIFTH. The defendant is without knowledge of the matters alleged in article " Fifth " of the petition and alleges that the lack of knowledge on the part of said petitioners was occasioned solely by his inactivity, inaction and laches.

SIXTH. Defendant admits and alleges litigation was begun by Stephen W. Carey and others for the purpose of setting aside on the ground of fraud the foreclosure decree theretofore entered and on or about December, 1889, a certain temporary injunction order was entered which upon the return thereof the court refused to make permanent ; that thereafter the case was tried, decided against the plaintiffs, and upon appeal to this Court, said decision was affirmed. Except as above admitted or alleged, the defendant has no knowledge of the allegations contained in article " Sixth " of the petition.

SEVENTH. Defendant has no knowledge of the allegations contained in article " Seventh " of the petition.

EIGHTH. Defendant is advised that the allegations contained in article " Eighth " of the petition, except that as to no previous application having been made, are conclusions of law, and that it is not called upon to answer to the same.

V. Defendant alleges that the petitioner is not similarly situated to the plaintiffs, and that justice and equity requires petitioner should be compelled to duly prove his cause of action, and that it would be unfair and inequitable to permit him to intervene in the case at bar or to open the decree therein for his benefit if the same be affirmed by this court, because such action would deprive the defendant of good and valid defenses to said alleged cause of action, which defenses were held not open to it as against the plaintiffs by reason of

the difference in the situation of the plaintiffs, and the petitioner.

VI. The case at bar is not one in which a fund is in the possession or under control of the court, and is not one in which the decree entered sought to distribute such fund to the exclusion of persons equitably entitled to share therein. The shares of stock which the defendant obtained under the Plan of Reorganization were never taken possession of by the court. Both the interlocutory and final decrees entered in the case at bar made provision for stockholders of the Old Company similarly situated.

WHEREFORE, the defendant, Southern Pacific Company, prays that the petition be denied in all respects and that the petitioner be not allowed to intervene herein or be granted any of the other relief prayed for.

SOUTHERN PACIFIC COMPANY,

by

HUGH NEILL,

Secretary,

Defendant-Appellant.

ARTHUR H. VAN BRUNT,

LEWIS H. FREEDMAN,

Counsel for Defendant-Appellant,

No. 54 Wall Street,

New York City, N. Y.

STATE OF NEW YORK, }
 County of New York, } ss. :

HUGH NEILL, being duly sworn, deposes and says that he is the Secretary of Southern Pacific Company, the defendant-appellant in the above-entitled cause; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

HUGH NEILL.

Sworn to before me this 5th }
 day of October, 1918. }

THOMAS F. DOUGHERTY,

(Notarial Seal.)

Notary Public No. 104,

New York County.

To SCOTT, GERARD & BOWERS,

Attorneys for Petitioners,

No. 46 Cedar Street, New York City, N. Y.

H. SNOWDEN MARSHALL, Esq.,

No. 61 Broadway, New York City, N. Y.,

A. J. DITTENHOEFER, Esq.,

32 Broadway, New York City, N. Y.,

DUDLEY F. PHELPS, Esq.,

32 Broadway, New York City, N. Y.,

Attorneys for Plaintiffs-Respondents.

Supreme Court of the United States,

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

against

HENRY L. BOGERT, TOWNSEND LAWRENCE
and ANITA LAWRENCE, as Executors under
the Last Will and Testament of Walter
B. Lawrence, deceased, suing on behalf
of themselves and other stockholders of
the Houston & Texas Central Railway
Company, similarly situated, who may
come in and contribute to the expenses
of this action; HENRY FITCH and RUS-
SELL H. LANDALE, as Survivors of Com-
mittee of Stockholders; SARA ROSEN-
FELD and ROSETTA COHN, as Executrices
under the Last Will and Testament of
Charles Minzensheimer and Michael
Gernsheim,

Plaintiffs-Respondents.

In the Matter of the Application of THE
CORN EXCHANGE BANK to be made party
to the action in this court or given per-
mission to apply to the District Court to
be made party and for amendment of the
judgment so as to include THE CORN EX-
CHANGE BANK in its benefits, or in the
alternative for a modification of the
judgment in case the plaintiff's cause of
action is affirmed,

Intervener.

No. 773.
October
Term, 1917.

YOUR PETITIONER, THE CORN EXCHANGE BANK, a
corporation duly organized and existing under

- 4 and pursuant to the Laws of the State of New York, and having its principal place of business in the City of New York, praying for leave to be made a party to the above entitled action or for permission to apply to the District Court of the United States for the Eastern District of New York, to be made a party plaintiff to this action and for the amendment of the judgment herein so as to include Petitioner within its benefits, or in the alternative that if the aforesaid relief is refused that this Court, in case it sustain the right of the plaintiffs to the relief asked for shall modify the decree of the Court below by directing
- 5 that the action shall be referred to a master and that three months public advertisement or such other suitable notice as to this Honorable Court shall seem proper, be given to all the stockholders similarly situated with plaintiffs, to appear before said master and establish their claims against the defendant, and that the District Court be directed to enter judgment for such stockholders as shall prove such claims in the same manner that judgment has been entered in favor of the plaintiffs herein upon their contributing their share of the expenses of this petition,
- 6 respectfully represents:—

First.—That it is and has been since the year 1899, the owner of one hundred (100) shares of the capital stock of the Houston and Texas Central Railway Company.

Second.—That said stock was acquired as a part of the assets of the Queens County Bank in Queens County, New York, which was purchased by and consolidated with The Corn Exchange Bank in the year 1899.

Third.—That said Queens County Bank acquired said stock from one Rufus W. Leavitt of Queens County, New York, on May 1, 1888, in part satisfaction of a judgment upon a note which said Leavitt had discounted with said Bank and as collateral security for the payment of which he had deposited said one hundred (100) shares of stock with said Bank. 7

Fourth.—On information and belief petitioner avers the matters set out in this and the following paragraphs hereof numbered Fifth to Forty-fourth inclusive, to-wit:—at all the times hereinafter mentioned the defendant, Southern Pacific Company, was and is a corporation organized and existing under and by virtue of the Laws of the State of Kentucky, and the Houston and Texas Central Railroad Company, hereinafter called the Railroad Company, was and is a corporation organized and existing under and by virtue of the Laws of the State of Texas, and the Houston and Texas Central Railway Company, hereinafter called the Railway Company, was a corporation organized and existing under and by virtue of the Laws of the State of Texas. 8

Fifth.—The Railway Company was at the times hereinafter mentioned in possession and engaged in the operation of various lines of railway in the State of Texas. The said Railway Company had issued and outstanding capital stock to the extent of 77,269 shares of the par value of \$7,726,900, all of which was fully paid and nonassessable. 9

Sixth.—The plaintiffs allege that the said Railway Company had received from the State of Texas large grants of land for the purpose of aiding in the building, construction and equipment

- 10 of the lines of the said railway. At the time of the Reorganization Agreement hereinafter mentioned, the said company owned and held 4,500,000 acres of land, received as aforesaid from the State of Texas, which land was then and there of the value of about \$15,000,000.

- 11 *Seventh.*—Before the date of the Reorganization Agreement hereinafter referred to, the said Railway Company had executed and delivered seven different mortgages to various trustees to secure seven different issues of bonds. Under each of said mortgages, except one, bonds secured respectively by the said mortgages, had been issued and were outstanding. Under one of said mortgages, known as the income and indemnity mortgage, all of the bonds which had been issued were called in, except one bond for Five Hundred Dollars, which was lost.

- 12 *Eighth.*—The defendant, Southern Pacific Company acquired and, at all the times hereinafter mentioned, held control of the majority of the stock of the said Railway Company, by reason of the following facts: In the years 1883 and 1884 Morgan's Louisiana and Texas Railroad and Steamship Company, a Louisiana corporation, owned more than a majority of the outstanding capital stock of the said Railway Company, owning stock of the par value of about \$4,000,000 out of a total issue of \$7,726,900. In the early part of the year 1883, the Southern Development Company, a California corporation, acquired and thereafter held more than a majority of the capital stock of the said Morgan's Louisiana and Texas Railroad and Steamship Company. In 1885, the defendant, Southern Pacific Company, acquired from the Southern Development Company, and

thereafter held, more than a majority of the capital stock of Morgan's Louisiana and Texas Railroad and Steamship Company. From and after the year 1885, when the defendant, Southern Pacific Company, so acquired control of more than a majority of the stock of the said Morgan's Louisiana and Texas Railroad and Steamship Company, the said defendant, Southern Pacific Company, by means of said control, selected and elected officers and directors of the said Railway Company, and said Southern Pacific Company controlled and dictated the policy of the said Railway Company and the action of its officers, attorneys and agents.

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Ninth.—In or after the year 1885, the said Railway Company became involved in litigations with its secured and unsecured creditors. On February 11, 1885, the trustees of one of the mortgages upon part of the property of the Railway Company, brought a suit against the said Railway Company, but not a suit to foreclose the said mortgage. On the same day the same individuals, as trustees of another of the said mortgages upon part of the property of the said Railway Company, commenced another suit against the said Railway Company, but not a suit to foreclose said mortgage. Each of said suits was commenced by bill in equity, filed in the United States Circuit Court for the Eastern District of Texas. In said suits the trustees under said mortgages complained that the said Railway Company had failed to make provisions for the sinking funds required respectively by said mortgages to be set aside, and had violated other terms and agreements contained in the said mortgages. The said trustees further alleged that the said Railway Company was diverting to other creditors' funds

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16 the proceeds of lands which should be applicable to the mortgages whereof they were trustees, and alleged other grievances against the said Railway Company. To said two bills the Railway Company, on June 22, 1885, interposed answers, admitting some of the grievances complained of and denying others, and denying the rights of complainants to any relief; and the said two suits were placed upon the docket of the said United States Circuit Court numbered respectively 183 and 184. No further proceedings were taken in said suits for a long period of time thereafter.

17 *Tenth.*—On February 16, 1885, the said Southern Development Company, the majority of the stock of which at the time was owned and controlled by the defendant, Southern Pacific Company, filed a bill in the said United States Circuit Court for the Eastern District of Texas, against the said Railway Company. In said bill the complainant alleged the existence of various mortgages upon various parts of the property of the said Railway Company, and alleged the amount of bonds outstanding under each of said mortgages; it alleged a floating indebtedness, due partly to it-
 18 self, and claimed that said floating indebtedness was entitled to an equity superior to that of the mortgage bondholders. The bill alleged various other facts and circumstances; and six days after the same was filed, upon the consent of the said Railway Company, which, together with the complainant, the Southern Development Company, was controlled by the defendant, Southern Pacific Company, the Court in said suit appointed two individual receivers of the said Railway Company and its property.

Eleventh.—On April 20, 1885, an amended bill was filed by the said Southern Development Company, alleging certain other and further alleged grievances in addition to those set out in its original bill. 19

Twelfth.—On July 7, 1885, the said Railway Company filed its answer to the said suit of the said Southern Development Company, in which answer it admitted the necessity for the appointment of receivers.

Thirteenth.—On March 18, 1885, The Farmers' Loan & Trust Company, as trustee of one of the seven mortgages covering the property of the said Railway Company, filed its bill against the said Railway Company in the said United States Circuit Court for the Eastern District of Texas. In said bill of complaint the complainant alleged violation by the said Railway Company of various terms and stipulations contained in the said mortgage whereof the complainant was trustee, and alleged default in the payment of certain coupons due upon the bonds secured by various mortgages. It prayed for a decree requiring an accounting of the sales of certain lands covered by the said mortgage, and for an injunction and other relief. Neither this bill of complaint, nor any of the bills filed theretofore by the trustees of any of the mortgages, contained any allegation that the principal secured by the said mortgages had become due; nor was any foreclosure asked for or demanded in any of said bills of complaint. 20 21

Fourteenth.—On June 22, 1885, the said Railway Company filed its answer to the said bill of complaint of the said Farmers' Loan & Trust Company, denying some of said allegations and ad-

- 22 mitting others and denying the right of the complainant to any relief, and the said suit was entered on the docket of the said United States Circuit Court for the Eastern District of Texas as No. 188. The said suit remained on the said docket at issue, and no active steps were taken to press the same to trial.

- Fifteenth.*—On October 5, 1885, the Trustees of certain of the mortgages covering the property of the said Railway Company demurred to the bill of complaint of the Southern Development Company, which demurrer was thereafter and on 23 May 27, 1886, sustained, and the said bill of the Southern Development Company dismissed.

- Sixteenth.*—On January 21, 1886, the Trustees of two mortgages covering different portions of the property of the said Railway Company, filed bills in equity in the said United States Circuit Court, for the Eastern District of Texas, demanding the foreclosure of the said mortgages. The said bills alleged default in the payment of interest due under said mortgages respectively and claimed that the said Railway Company, by its 24 acts prevented the said trustees from taking possession of and operating the said portion of said railway, as they were entitled to do, in case of failure by the said Railway Company to pay interest. The said bills alleged other grievances, and alleged the insolvency of the Railway Company, and demanded that the property of the said Railway Company should be sold to prevent an irreparable injury.

Seventeenth.—To said bills respectively the Railway Company interposed answers, denying some of the allegations of the said Bills, and ad-

mitting others. In said answers the said Railway Company set up the fact that the principal sum of the bonds secured by the said mortgage had not become due and demandable by virtue of the matters and things alleged in the said Bill of Complaint. The said answers further pleaded the Statute of Limitations, and ratification by the said Trustees of certain of the wrongs complained of in the said Bills of Complaint. Said answers further averred that the said mortgages under which the said property was sought to be foreclosed covered only part of its system, and that its rolling stock belonged to its system as a whole and could not be apportioned among the different divisions. Said Railway interposed various other good and valid defenses to the said suits to foreclose and the said suits were placed upon the docket of the said United States Circuit Court for the Eastern District of Texas, and known as suits No. 198 and No. 199. No effort was made to overcome the defenses interposed by the said Railway Company to the said suits to foreclose, and no steps were taken to bring the same to a hearing.

Eighteenth.—On April 24, 1886, The Farmers' Loan & Trust Company, as Trustee of one of the mortgages covering property of the said Railway Company, filed a Bill of Complaint in said United States Circuit Court for the Eastern District of Texas, averring various defaults and breaches by the Railway Company of its contracts and obligations under the terms of the said mortgage. The said Bill of Complaint set up certain claims and sought certain relief against other creditors and against the Trustee of other mortgages who had theretofore filed Bills in said Court. The said Complainant demanded relief that the property

- 28 of the said Railway Company be sold in satisfaction of its claim.

Nineteenth.—Neither the said mortgage of which the said The Farmers' Loan & Trust Company was Trustee, nor any of the other mortgages heretofore referred to, permitted a foreclosure or sale of the property for non-payment of interest, nor by the terms of said mortgages, or any of them, was the principal debt made due thereunder by reason of failure to pay interest nor had any of the said mortgages matured. On the contrary, each and all of the said mortgages provided that
 29 in the event of non-payment of interest, the Trustees of the said mortgages should be entitled to enter into and take possession of the portion of the Railway covered by the respective mortgages and operate the same until the said arrears of interest were extinguished.

Twentieth.—On September 3d, and on September 9th, 1886, respectively, the Railway Company filed answers to the Bill of Complaint of the said Farmers' Loan & Trust Company to foreclose the mortgage of which it was Trustee, in which answers the said Railway Company denied
 30 certain allegations of the said Bill, and admitted others, and denied the right of said complainant to any relief, and put at issue the suit of the said The Farmers' Loan & Trust Company.

Twenty-first.—On May 26th, 1886, all of said suits affecting the property of the said Railway Company were consolidated and numbered Cause No. 198 upon the docket of said Court. The Receivers appointed by consent in the suit of the Southern Development Company were discharged on May 27th, 1886, and the property placed in

the hands of Receivers appointed in the consolidated cause No. 198. 31

Twenty-second.—In said consolidated cause No. 198, various pleadings had been filed by parties thereto, raising questions between different classes of mortgage creditors and the said Railway Company, and between various creditors of the said Railway Company as among themselves, and questions affecting judgment creditors of the said Railway Company, and questions as to whether or not the property of the said Railway Company could be sold in parcels or as an entirety, and questions as to what disposition should be made of the rolling stock of the Railway Company, if the Railway could be sold in parcels, and questions as to whether or not the said Railway Company was acting in collusion with certain of its creditors as against others. The defenses to each and all of the suits interposed by the said Railway Company were never overcome in said litigations. Said defenses were valid, legal defenses to the said suits and each and all of them, and could not be overcome save by the consent of said Railway Company. The Railway Company had interposed the defense, among others, that none of the mortgages which the respective Trustees sought to foreclose could be foreclosed until there occurred a default in the payment of the principal of the said Bonds secured thereby; and that no default in the payment of the principal of the said bonds had occurred. The defenses to the suits of different creditors interposed by the said Railway Company were good, legal and valid defenses to the suits brought by the different Trustees and different classes of creditors and the different classes of creditors were prevented from pro- 32 33

34 ceeding to judgment by said valid defenses, and also by the controversies which had arisen and were set up in the pleadings in the said cause between the creditors themselves. No step was taken to bring said cause on for a hearing. By interposing the answers and defense hereinbefore referred to, the said Railway Company, which throughout all of said period, was controlled by the defendant Southern Pacific Company, as aforesaid, had prevented and was preventing the foreclosure of any mortgage or lien upon its property.

35 *Twenty-third.*—Thereafter negotiations were entered into between the defendant Southern Pacific Company, and the holders of Bonds under six of the seven mortgages which had been placed upon the property of the said Railway Company, which resulted finally in the formation and execution in the City and State of New York of a Reorganization Agreement, a copy of which is here-
 36 to annexed as a part of this complaint and marked “Exhibit A.” The said Agreement was executed by the Southern Pacific Company, by the Central Trust Company of New York and by a large number of holders of Bonds under each of the said six mortgages upon property of the said Railway Company referred to in said Agreement.

Twenty-fourth.—By the terms of said Agreement the Southern Pacific Company, which controlled, as aforesaid, a majority of stock of the said Railway Company, was permitted and allowed to take stock of the proposed new and reorganized company upon terms different from and better than the terms proposed by said agreement to be offered to the minority stockholders of the said Railway

Company. By the said Agreement the said Southern Pacific Company had stipulated that all existing mortgages upon the property of the said Railway Company should be foreclosed, and had given to said Central Trust Company of New York, the right to declare due the principal of the mortgages upon the property of the said Railway Company. Said stipulation could not be carried out by the said Southern Pacific Company, except through the control which the said Company held of a majority of stock of the said Railway Company, and control of the officers and attorneys for said Railway Company, and said stipulations were thereafter carried out by the said Southern Pacific Company, through and by means of the said control by the Southern Pacific Company of a majority of stock of the said Railway Company and control of the officers and attorneys of said Railway Company.

Twenty-fifth.—The said Reorganization Agreement was thereafter carried out according to its terms, except, as hereinafter stated, it was not carried out in its provisions concerning the lands owned by said Railway Company. On April 30, May 1, May 2 and May 3, 1888, various new pleadings and answers were filed in the United States Circuit Court for the Eastern District of Texas, demanding the foreclosure and sale of all of the mortgages upon the property of the said Railway Company, to which pleadings the Railway Company interposed no defense; and on May 4, 1888, a consent decree of foreclosure was filed by which it was adjudged and decreed that the principal and interest of each and all of the said mortgages was due and payable, and that the whole property of the Railway Company should be sold in default of payment of the said mortgage indebtedness,

40 which was fixed by the said decree at over \$19,000,000.

Twenty-sixth.—The said decree was entered by consent of said Railway Company and all other parties to said suits, and had, prior to its presentation to the Court, been prepared and agreed to by the attorneys representing the parties to the said plan of reorganization, and especially by the attorney for the Southern Pacific Company. The good and valid defenses of the Railway Company to the foreclosure of the said mortgages were not insisted upon, but were withdrawn because the
 41 said Southern Pacific Company, by reason of its control of the said Railway Company, was able to and did procure the assent of the said Railway Company to the carrying out of the said plan of reorganization. The principal of the said mortgage bonds was not in fact due, and was found due only because the Southern Pacific Company had by the said Agreement given the Central Trust Company the right to declare the said principal due. The said Southern Pacific Company was able to and did procure the carrying out of the said Reorganization Agreement and the with-
 42 drawal of all defenses to said suits theretofore interposed by the Railway Company.

Twenty-seventh.—A foreclosure sale was thereafter held pursuant to the said decree of May 4, 1888, at which sale the property was bid in by Frederic P. Olcott, President of the Central Trust Company, acting for said Trust Company, and acting in pursuance of the said Reorganization Agreement. No part of the money or bonds paid, delivered or surrendered at the said sale, for the property bid in by the said Olcott, belonged to him, but said money and bonds were furnished

under and pursuant to the said Reorganization Agreement. At said foreclosure sale, the said Olcott also bought in all the said lands owned by the said Railway Company pursuant to said Reorganization Agreement. A new railroad corporation was organized pursuant to the terms of the Reorganization Agreement which was known as the Houston and Texas Central Railroad Company. To said new Company the said Olcott transferred the lines of railroad, rolling stock, etc., purchased at said foreclosure sale. The said Railroad Company thereupon executed bonds secured by three mortgages prepared, executed and delivered in accordance with the Reorganization Agreement, which bonds were delivered to the Central Trust Company and by it distributed among the bondholders who had deposited their Bonds with said Trust Company under the Reorganization Agreement. All of the bondholders of the old Railway Company accepted said new bonds of the new Railroad Company, according to the provisions of the Reorganization Agreement. The said lands purchased by said Olcott were transferred to certain Trust Companies as trustees for the benefit and use of the said new Railroad Company.

Twenty-eighth.—The Central Trust Company of New York, as agent under the said Reorganization Agreement thereafter required the minority stockholders of the Railway Company who wished to receive the benefits of said Reorganization Agreement, to pay a prohibitive assessment, amounting to over \$70 for each share of stock, held by each minority stockholder, but no notice of this fact was communicated or received by the Petitioner or its predecessors in title, the Queens County Bank or the Flushing and Queens County Bank.

- 46 No minority stockholder paid such assessment and all of the \$10,000,000 (par value) of stock of the new reorganized company was taken over by the defendant Southern Pacific Company on terms far more favorable to said Southern Pacific Company than the said terms offered to the minority stockholders, which said stock was delivered to and received by the said Southern Pacific Company in the City and State of New York. The Southern Pacific Company now holds and claims to own the whole of the stock of the reorganized Railroad Company. Said stock was and is now of great value. During the time since the Southern Pacific
- 47 Company acquired the said stock, it has made great profit by its ownership and control of said stock in the way of dividends and otherwise.

Twenty-ninth.—In order to acquire said stock under the Reorganization Agreement the said Southern Pacific Company undertook to guarantee certain obligations of the reorganized Railroad Company, as appears from said Reorganization Agreement; but it has never been called upon to pay any sum on account of its said guarantees. The Southern Pacific Company was also required

48 under said Reorganization Agreement to pay certain expenses and charges of reorganization the exact amount of which is not known to petitioner.

Thirtieth.—The defendant, Southern Pacific Railroad Company acquired the said \$10,000,000 par value of stock of the reorganized Railroad Company, through and by means of its ownership and control of a majority of stock of the Railway Company and through its control of the directors, officers and attorneys of said Railway Company; and through and by means of its power to cause the said Railway Company to withdraw defenses

which it had interposed to the suits against the Railway Company, which defenses were interposed for the benefit of said Railway Company and all of the stockholders thereof; and through the consent which the said Southern Pacific Company gave, and which it caused the said Railway Company to give, to the entry of a decree declaring due the principal of all of the mortgages upon property of the said Railway Company. The acquisition of the said \$10,000,000 par value of stock of the new Railroad Company was obtained by the said Southern Pacific Company in consideration of the performance by the said Railway Company of corporate acts and the withdrawal by the said Railway Company of defenses which had been interposed for the benefit of the said Railway Company and all its stockholders. The payment to the Southern Pacific Company of the said \$10,000,000 par value of stock of the new Railroad Company was a part of and in consideration of a composition between said Railway Company and its mortgage creditors, set out and described in said Reorganization Agreement. The mortgage creditors permitted and allowed the said Southern Pacific Company to take the whole capital stock of the new company in consideration of the withdrawal by the old Railway Company of defenses which prevented the foreclosures of mortgages. And the said Southern Pacific Company received the Ten Million Dollars of stock and obtained for itself better terms in the distribution of said stock than was given to the minority stockholders of the said Railway Company, because of and by reason of its control of a majority of the stock of the said Railway Company, and of the officers, directors and attorneys of said Railway Company. When the said Southern Pacific Company received and

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- 52 accepted the said Ten Million Dollars of stock, it received the same charged and impressed with a trust for the benefit of the minority stockholders, and the said Southern Pacific Company now holds the said stock as such Trustee, and not in its own right.

- Thirty-first.*—Since the aforesaid foreclosure sale in 1888, the Railway Company has owned no property and has transacted no business. No meetings of stockholders of the Railway Company have taken place since September 8th, 1888, the date of the foreclosure sale, and no meetings of
53 the directors of said company have been held since June 7th, 1890. And since 1890, said company has had no place of business.

- Thirty-second.*—As soon as the terms of said Reorganization Agreement were announced and published, S. W. Carey, Cornelius MacArdell, Walter B. Lawrence and other stockholders of the Railway Company protested against the terms of the said agreement, claiming that it practically gave the Railway Company to the Southern Pacific Company in fraud of the individual stockholders.
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Thirty-third.—Immediately after the entry of the said Consent Decree of May 4th, 1888, the said Carey, MacArdell, Lawrence and other stockholders of the said Railway Company formed a committee of stockholders to protect themselves from the frauds committed and proposed to be committed by the Southern Pacific Company under the said Reorganization Agreement and Consent Decree, and said committee of stockholders employed as counsel, Frederick R. Couderd, Edward M. Shepard and A. J. Dittenhoefer

of New York City, Jefferson Chandler of St. Louis, and later on H. Snowden Marshall, Russell H. Landale, and David Gerber, and from the commencement of their first suit, hereinafter mentioned, to the present day, the firm of Dittenhoefer, Gerber & James has been their attorneys of record. 55

Thirty-fourth.—The said MacArdell and other stockholders of said committee, before and prior to the commencement of the above entitled action and the actions hereinafter set forth, did request the directors of the Railway Company to commence an action against the Southern Pacific Company and others for an accounting and other appropriate relief, so as to have restored to the individual stockholders of the Railway Company their proper share of stock in the new Railroad Company to which the assets and property of the original Railway Company was turned over. The said directors failed, neglected and declined to commence any action against the Southern Pacific Company. That the said directors were selected and directed by the Southern Pacific Company which controlled the majority of the stock of the Railway Company, and their interests were inimical to those of the other individual stockholders of the Railway Company similarly situated. The present survivors of the directors remain allied with the Southern Pacific Company, so that no relief of any sort can be obtained by said individual minority stockholders through their aid. 56 57

Thirty-fifth.—After their efforts out of Court had failed to bring them any relief, the said individual stockholders represented at that time by the said McArdle and Stephen W. Carey and

- 58 others owning over 18,000 shares of stock, which was all owned by them prior to the entry of the said Consent Decree of May, 1888, commenced an action in the United States Circuit Court, in Texas, in December, 1889, for the benefit of the said association of minority stockholders against the Houston and Texas Central Railway Company, certain Trust Companies and individuals and corporations, including the Southern Pacific Company, attacking said foreclosure proceedings and consent decree. The plaintiffs who appeared in said action were Stephen W. Carey, Warren S. Sillocks, J. Van Schaick, D. P. Ingraham, Jr.,
- 59 James Landale, George Wilson and Andrew S. McClelland.

Thirty-sixth.—In 1890 an injunction was obtained in said Carey case, which was afterwards set aside, and various motions were made in the Circuit Court, and before different Justices of the United States Supreme Court in Washington. The case was tried in 1892 and decided against the plaintiffs. Appeals were taken in due course to the Circuit Court of Appeals and United States Supreme Court, and the case was finally terminated in the United States Supreme Court, in

60 1896.

Thirty-seventh.—Shortly after said Carey case was started in Texas, and in August, 1891, the said Cornelius MacArdell, another member of the said Committee of Stockholders, in the interest of the said Committee and the minority stockholders of the Railway Company, commenced an action in the New York Supreme Court against the Southern Pacific Company, the said Olcott, the Central Trust Company and others, and sought an injunction restraining the said Olcott

from parting with the lands held by him under the said Consent Decree, and preventing the said Olcott and the other defendants from carrying out the terms of the Reorganization Agreement and the said Consent Decree pending the trial of the action, which asked judgment that the said foreclosure sale be vacated and the Reorganization Agreement be annulled upon the ground of fraud, and that the defendants therein restore to the Railway Company the land, franchises and properties which had been taken from it under said decree of foreclosure. 61

Thirty-eighth.—In due course the said action was tried in March, 1902, at Special Term, New York Supreme Court, and was decided on June 16th, 1903, and judgment entered August 25th, 1903, in favor of the defendants, the Court holding that said foreclosure judgment was not obtained fraudulently. The plaintiffs appealed in September, 1903, and the Appellate Division affirmed the judgment in April, 1905, and in July, 1905, the plaintiffs appealed to the Court of Appeals, which in October, 1907, affirmed the judgment in favor of the defendants, by a divided court holding that the complaint did not set forth a cause of action by appellants as minority stockholders directly and solely against the Southern Pacific Company, as a majority stockholder, based upon a trust relationship to compel the latter to account directly to the former for the properties and stock which it held, and had obtained through said Reorganization Agreement and foreclosure decree, in violation of said trust relationship. The minority judges held that the complaint was broad enough to cover the appellants' contention that as the Southern Pacific Company, the majority stockholder of the Rail- 62

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64 way Company, had received the entire issue of \$10,000,000 of stock of the Railroad Company, the appellants should have an accounting and that a trust was impressed upon the property of the old Railway Company, now in the hands of the Southern Pacific Company, for the benefit of the minority stockholders, and that, therefore, the judgment appealed from should be reversed, and the Southern Pacific Company account to the minority stockholders for their share of the said Railroad stock.

65 *Thirty-ninth.*—In February, 1908, within four months of the final decree in the MacArdell case, Walter B. Lawrence, another member of the said committee of stockholders, in behalf of the said stockholders, commenced another action on the lines indicated by the New York Court of Appeals in their decision in the said MacArdell case, in the Supreme Court of New York, against the Southern Pacific Company, the said Olcott, the Central Trust Company and others, to compel the Southern Pacific Company to account to the stockholder of the Railway Company for the properties and assets of the said Railway Company it obtained
66 through the Reorganization Agreement and Consent Decree in fraud of rights of the said minority stockholders, and to compel the said Southern Pacific Company, to distribute to the said minority stockholders of the Railway Company the shares of stock of the Railroad Company that they would be entitled to on an accounting; the said complaint supplying the omissions in the MacArdell complaint and rectifying it as suggested by said Court of Appeals. In March, 1908, the defendants removed said action to the Circuit Court of the United States for the Eastern District of New York on the ground of diversity of citizenship.

Several motions were thereafter made unsuccessfully by complainants in said suit to remand the case to the State Court. In October, 1909, an order to show cause was obtained by the defendants why the complaint should not be dismissed on the ground of lack of jurisdiction of the Circuit Court to proceed without the Railway Company as a party defendant. In July, 1910, the Court decided the said motion in favor of the defendants and directed that the action should be dismissed for lack of jurisdiction in the Court to proceed unless the Railway Company was brought in as a party within a reasonable time. As said Railway Company was no longer carrying on business, and had no officer or director attending to its business, and upon whom service of process could be made, it could not be brought into the action as a party. Therefore, finally judgment was entered in September, 1910, dismissing the said action for lack of jurisdiction. An appeal was taken to the United States Supreme Court on September 23rd, 1910, which said Court dismissed for lack of jurisdiction in April, 1913.

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Fortieth.—That subsequently and on or about the 26th day of July, 1913, Henry L. Bogert, Townsend Lawrence and Anita Lawrence as Executors under the Last Will and Testament of Walter B. Lawrence, Deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company similarly situated who might come in and contribute to the expense of the action, and suing in conjunction with Henry Fitch and Russell H. Landale, as survivors of committee of stockholders, instituted the above entitled action setting out in their complaint in substance the matters set forth in paragraphs Fifth to

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- 70 Thirty-ninth, inclusive of this Petition and demanding:

First.—That it be adjudged and decreed that the defendant, Southern Pacific Company, acquired and holds the said \$10,000,000 par value of capital stock of the Houston and Texas Central Railroad Company, and all profits and earnings which it has received or may receive from holding said stock as Trustee for the plaintiffs and other minority stockholders of the Houston and Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action, in accordance as the respective rights of

71 the said Southern Pacific Company and the said minority stockholders may be adjusted by the Court.

Second.—That an accounting be had, and that the Southern Pacific Company be required to account for all stocks, moneys, property, benefits and advantages which it received, acquired, became or is entitled to pursuant and in furtherance of or because of the execution of the Reorganization Agreement hereinbefore referred to, and that on such accounting the said Southern Pacific Company be credited with such moneys as it may have

72 paid on account of guarantees and expenses of carrying out the said reorganization and be given all other proper credits; and that it be decreed to hold the balance in trust, to be ratably distributed among all the shareholders of the Houston and Texas Central Railway Company in proportion to the holdings of such shareholders in said Railway Company; and for such other and further relief as may seem just and proper, with the costs and disbursements of this action.

Forty-first.—Upon the 13th day of December, 1915, an interlocutory decree was entered

herein in which, among other things, it was de- 73
 creed. That the defendant, Southern Pacific Com-
 pany, in the year 1889, secured and still has in
 its possession and under its control, one hundred
 thousand (100,000) shares of the par or face
 value of ten million (\$10,000,000) dollars, of the
 common stock of the Houston & Texas Central
 Railroad Company, a corporation organized and
 existing under the laws of the State of Texas.
 That the total outstanding capital stock of the
 Houston & Texas Central Railway Company was
 seventy-seven thousand, two hundred and sixty-
 nine (77,269) shares, and the said defendant, 74
 Southern Pacific Company, now has in its pos-
 session and holds (unless pledged subsequent to
 receipt), for the benefit of the complainants and
 the other stockholders of the Houston & Texas
 Central Railway Company, respectively, who may
 come in and contribute to the expenses of this
 action, stock of the Houston & Texas Central Rail-
 road Company, in the following proportions: For
 each seventy-seven thousand two hundred and
 sixty-nine hundred thousandth of a share (.77269)
 of the stock of the Houston & Texas Central
 Railway Company, held by the complainants, and
 by the other stockholders of the said Railway
 Company who may come in and contribute to the 75
 expenses of this action, respectively, the defend-
 ant, Southern Pacific Company has in its pos-
 session and holds (unless pledged subsequently),
 for said complainant and other stockholders, one
 share of the capital stock of the Houston & Texas
 Central Railroad Company. * * * That any
 party may hereafter apply, upon notice to the
 other parties hereto, for such further order and
 direction as may be proper to carry out the pur-
 poses of this decree, and to be added at the foot
 hereof. No part of said judgment has been com-
 plied with by said Southern Pacific Company.

- 76 No notice of said judgment was given or ordered to be given to petitioner by publication or otherwise, and petitioner had no knowledge of such judgment until the time hereinafter stated.

The shares of stock so decreed to be held in trust are now of a value in excess of \$350 a share and if petitioner is granted the relief asked for he will be entitled to receive from said Southern Pacific Company stock of a value in excess of \$35,000.

- 77 *Forty-second.*—After said interlocutory decree had been rendered, Sarah Rosenfeld and Rosetta Cohen as Executrices under the Last Will and Testament of Charles Minzensheimer and Michael Gernsheim, who obtained knowledge thereof, were upon application permitted to intervene as minority stockholders who had interests similar to those of the plaintiffs.

- 78 *Forty-third.*—Thereafter and on or about the 5th day of October, 1916, a final decree was rendered herein adjudging and decreeing that each and every allegation contained in the complaint of Henry L. Bogert and others is true and adjudging that the Southern Pacific Company now holds and possesses various shares of stock in said reorganized company as Trustees for the benefit of the parties thereto, and further adjudging and decreeing that upon the payment of the sum of \$26,026. and the surrender of the stock held by such parties that the Southern Pacific Company should deliver certain shares of stock in said reorganized company to said parties, together with various dividends received thereon since said date, all of which is more particularly set forth in said final decree, to which petitioner begs leave to refer with the same force and effect as if set out at length herein.

Forty-fourth.—That an appeal from said final judgment was duly taken by the defendant, now appellant herein, to the Circuit Court of Appeals for the Second District, and said judgment was in all respects affirmed. Thereupon said defendant, Southern Pacific Company made application for a writ of certiorari for the review of such judgment by this Honorable Court, which writ was granted on or about the 23rd day of November, 1917, and said action is now pending for hearing before this court and by reason thereof the District Court has no jurisdiction of said cause and has no power to grant the relief prayed for herein viz.: to permit the intervention of petitioner in this cause and amend the judgment as herein asked for, except by permission of this Court, which now has exclusive jurisdiction of said cause. Petitioner further avers that another stockholder after the affirmance by the Circuit Court of appeals, made application to the District Court to be permitted to intervene in this action, but was refused such permission on the ground that the certiorari removed the cause from its jurisdiction.

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Forty-fifth.—That at the time said stock was acquired by said Queens County Bank the petitioner had no knowledge of the matters and things set forth in the paragraphs of this petition numbered Fifth to Thirty-first, and from said date down to the month of February, 1918, neither the petitioner nor said Queens County Bank had any knowledge of any of the matters referred to in paragraphs Fifth to Thirty-ninth above, except that there had been a foreclosure sale of said Railway Company's property and petitioner expressly avers that it had no knowledge of and was not informed of said reorganization agreement, nor did the petitioner have any knowledge

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- 82 of the pendency of this action, nor that the same had been brought for its benefit as a stockholder of the Houston & Texas Central Railway Company. That at various times during the years 1889 and thereafter, the petitioner made diligent inquiry in regard to the affairs of said Houston & Texas Central Railway Company and was informed that the said stock was of no value, owing to the foreclosure action above set forth, and since said date said stock has been retained in the vaults of the petitioner and its predecessor banks among the papers of the bank but was considered as of no value.

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Forty-sixth.—That the first knowledge that petitioner had of said reorganization agreement or that said stock was of any value or of the pendency of the above entitled suit, was obtained in the month of February, 1918, when a customer of the petitioner bank called upon the President thereof and sought to borrow money upon some stock of said Houston & Texas Central Railway Company, and informed said President of the above entitled litigation and of the judgment rendered therein, and that the said stock should be

- 84 of considerable value.

Forty-seventh.—Thereupon the petitioner made diligent inquiry as to this action and upon ascertaining that said action was pending in this Court, directed its attorneys to at once take steps to intervene in said action upon such terms and conditions with regard to the bearing of the expense of such litigation as should be deemed proper by the Court and petitioner alleges that since that date it has exercised the utmost diligence through its attorneys in preparing the necessary papers for the purpose of making this application.

Forty-eighth.—That no other or previous application has been made to this Court for the relief prayed for herein and no application therefor has been made to the District Court because by reason of the writ of certiorari granted by this Court, said District Court is and has been since petitioner had knowledge of the matters set forth in paragraphs Fifth to Thirty-ninth herein without jurisdiction of said cause and has no power by reason thereof to grant the relief asked for herein. 85

Forty-ninth.—That if the relief herein asked for is not granted much time of a trial court will be consumed in proving petitioner's said cause of action and petitioner will be put to large and unnecessary expense in making proof of the facts above alleged and already proven in this action. 86

WHEREFORE, petitioner prays an order of this Honorable Court to permit it to intervene and upon establishing the truth of the matters set forth in this Petition, that it be adjudged that the Petitioner shall be made a party to this action and included in the judgment herein upon such terms and conditions as to the payment of the costs of this action and attorneys' fees as the other parties to the action are required to pay or such as to this Court may seem just and proper and Petitioner further prays in the alternative, if such relief be refused by this Court, that permission be given it to make application to the District Court for the Eastern District of New York for leave to intervene in this action upon the terms and conditions as to costs and counsel fees imposed upon other interveners, or upon such terms and conditions as to costs and counsel fees as may seem to that court to be just and proper and that the said District 87

- 88 Court be granted permission by this Honorable Court upon finding the facts set forth in Petitioner's Petition to be true, to admit Petitioner as a party thereto upon such terms and conditions as to costs and counsel fees as shall be proper; and that the said District Court be granted permission to amend the judgment herein so as to add thereto a provision for the benefit of Petitioner similar to that now contained in said judgment in favor of other stockholders of said Houston and Texas Central Railway Company; and petitioner further prays in the alternative that if the aforesaid relief is refused that this Court, in case it
- 89 sustains the right of the plaintiffs to the relief asked for, shall modify the decree of the Court below by directing that the action shall be referred to a master and that three months' public advertisement or such other suitable notice as to this honorable Court shall seem proper be given to all stockholders similarly situated with plaintiffs to appear before said master and establish their claims against the defendant and that the District Court be directed to enter judgment for such stockholders as shall prove such claims in the same manner that judgment has been entered in favor of the plaintiffs herein, upon their contributing their share of the expenses of this petition.
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The Petitioner further prays for such other and further relief as to the Court may seem just or proper.

THE CORN EXCHANGE BANK,
By WALTER E. FREW, President,
Petitioner.

STATE OF NEW YORK, } ss.:
 County of New York, }

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WALTER E. FREW, being duly sworn, deposes and says that he is the President of The Corn Exchange Bank, petitioner in the within petition; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

WALTER E. FREW.

Sworn to before me this)
 30th day of April, 1918.)

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E. H. DENIKE,

Notary Public No. 68,

New York County.

Register N. Y. No. 8020.

New No.

NOTARY PUBLIC NO. 54

NEW YORK COUNTY

REGISTER N. Y. NO. 10,013

SEAL

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SUPREME COURT OF THE UNITED
STATES,

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,
against

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HENRY L. ROBERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company similarly situated who may come in and contribute to the expenses of this action; HENRY FITCH and RUSSELL H. LANDALE, as Survivors of Committee of stockholders; SARA ROSENFELD and ROSETTA COHN, as Executrices under the Last Will and Testament of Charles Minzensheimer and Michael Gernsheim,

Plaintiffs-Respondents.

No. 773
October
Term 1917.

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IN THE MATTER of the Application of THE CORN EXCHANGE BANK to be made party to the action in this Court or given permission to apply to the District Court to be made party and for amendment of the judgment so as to include THE CORN EXCHANGE BANK in its benefits, or in the alternative for a modification of the judgment in case the plaintiff's cause of action is affirmed,

Intervener.

SIRS:—

PLEASE TAKE NOTICE that we shall, on or before the **3rd** day of **June**, 1918, file in the

office of the Clerk of the Supreme Court of the 97
 United States, the foregoing Petition for leave
 to intervene in the above entitled cause, or for
 permission to apply to the District Court for the
 Eastern District of New York for permission to
 intervene in said cause, and to amend the judg-
 ment therein; and will also file a brief in the
 above entitled cause, a copy of which brief will
 be served upon you more than ten days prior to
 said 3rd day of June 1918, and that we shall, on
 the 3rd day of June 1918, being a motion day of
 the October Term, 1917, of the Supreme Court of
 the United States, upon the opening of Court, or 98
 as soon thereafter as counsel can be heard, at the
 Court Room of the Supreme Court of the United
 States, move that the Petitioner, The Corn Ex-
 change Bank, be permitted to intervene in the
 above-entitled cause, or given permission to ap-
 ply to the District Court for the Eastern District
 of New York for permission to intervene in said
 cause, and for the amendment of said judgment
 as in the Petition prayed for, or in the alterna-
 tive that if the aforesaid relief is refused that
 this Court, in case it sustain the right of the
 plaintiffs to the relief asked for shall modify the
 decree of the Court below by directing that the 99
 action shall be referred to a master and that
 three months' public advertisement or such other
 suitable notice as to this Honorable Court shall
 seem proper, be given to all the stockholders
 similarly situated with plaintiffs, to appear be-
 fore said master and establish their claims
 against the defendant, and that the District Court
 be directed to enter judgment for such stock-
 holders as shall prove such claims in the same
 manner that judgment has been entered in favor

100 of the plaintiffs herein upon their contributing their share of the expenses of this petition.

Yours, &c.,

May 1, 1918.

SCOTT, GERARD & BOWERS,
Attorneys for The Corn Exchange Bank,
46 Cedar Street,
Borough of Manhattan,
New York City.

To:

101 LEWIS H. FREEDMAN, Esq.,
54 Wall Street,
New York City.

ARTHUR H. VAN BRUNT, Esq.,
54 Wall Street,
New York City.
Counsel for the above-named Defendant-Appellant; and

H. SNOWDEN MARSHALL, Esq.,
61 Broadway,
New York City;

102 A. J. DITTENHOEFER, Esq.,
32 Broadway,
New York City, and

DUDLEY F. PHELPS, Esq.,
32 Broadway,
New York City,
Attorneys for Plaintiffs-Respondents.

16

Supreme Court of the United States,

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,
against

HENRY L. BOGERT, TOWNSEND LAWRENCE
and ANITA LAWRENCE, as Executors un-
der the Last Will and Testament of
Walter B. Lawrence, deceased, suing on
behalf of themselves and other stock-
holders of the Houston & Texas Central
Railway Company similarly situated
who may come in and contribute to the
expenses of this action, HENRY FITCH
and RUSSELL H. LANDALE, as Survivors
of Committee of stockholders, SARA
ROSENFELD and ROSETTA COHN, as Ex-
ecutrices under the Last Will and Tes-
tament of Charles Minzensheimer and
Michael Gernsheim,

Plaintiffs-Respondents,

In the Matter of the Application of THE
CORN EXCHANGE BANK to be made party
to the action in this court or given per-
mission to apply to the District Court
to be made party and for amendment of
the judgment so as to include THE CORN
EXCHANGE BANK in its benefits or in the
alternative for a modification of the
judgment in case the plaintiff's cause of
action is affirmed.

Intervener.

No. 305
October
Term,
1917.

Brief in Support of Petition to Inter- vene, &c.

We are not unmindful that this petition is an
unusual one to make to this Court even though

the authorities hereinafter cited clearly support the right of this Court to grant the relief asked for.

We have filed this petition because in this way only can the petitioner obtain that relief to which he is entitled under the very extraordinary facts existing in the case at bar, without resorting to an expensive and lengthy proceeding in equity in which the time of the Courts and the money of our client would be expended in establishing the same general cause of action as has already been established in the case at bar.

This action was brought by a minority stockholder of the now defunct Houston & Texas Central Railway Company suing in behalf of himself and all other stockholders thereof similarly situated, who should come in and contribute to the expenses of the action. The action was in equity against the Southern Pacific Company to establish a resulting trust in and to certain shares of stock of the Houston & Texas Central Railroad Company, which the Southern Pacific Company had acquired and now holds as a result of a very vicious betrayal of the rights of the minority stockholders of said Houston & Texas Railway Company by the majority stockholder thereof, which was a company controlled by the defendant and which acted in its interest. Of all the matters set out in the complaint the petitioner was ignorant (Petition, Par. 46). The plaintiff has been successful in said action and an interlocutory decree was entered herein upon the 13th day of December, 1915, in which it was decreed that the defendant, Southern Pacific Company in the year 1889 secured and still has in its possession and holds for the benefit of the complainants and

other stockholders of the Houston & Texas Central Railway Company, respectively, who may come in and contribute to the expenses of this action, stock of the Houston & Texas Central Railroad Company in the following proportion, viz.: One (1) share of stock of the Houston & Texas Central Railroad Company for every .77469 shares of stock of the Houston & Texas Central Railway Company (par. 41).

Although the authorities hold that it is the duty of the Court under such circumstances to direct a reference and give reasonable notice to other stockholders of their right to be made a party upon proving their ownership of stock (See cases cited under Point II infra), no notice of this decree was given or ordered to be given to petitioner by publication or otherwise. As a result thereof petitioner, who owns one hundred shares of the stock of said Houston & Texas Central Railway Company, which stock could upon the payment of a small sum of money be exchanged under said decree for stock of the Houston & Texas Central Railroad Company worth upwards of \$35,000. (Par. 41), had no knowledge of said decree until by the merest chance it heard of it after the writ of certiorari herein had been granted by this Court.

A couple of minority stockholders who were more fortunate than petitioner, in some way obtained knowledge of said decree before final judgment and made application to be made parties herein and were duly admitted by the District Court as parties and made proof of their stock ownership, and were included in the final judgment subsequently entered in this action on the 5th day of October, 1916 (Pars. 42 and 43). This

judgment found that all the allegations of the petitioner were true and that the Southern Pacific Company held said stock in trust, as aforesaid (Par. 43).

Thereupon an appeal was taken to the Circuit Court of Appeals for the Second Circuit and was on or about the 2nd day of July, 1917, in all respects affirmed, and shortly thereafter application was made to this court for a writ of certiorari and on or about the 23rd day of November, 1917, a writ of certiorari was duly granted by this Court and the action is now pending for hearing before this Court.

The granting of the writ of certiorari herein took this action entirely out of the jurisdiction of the lower Court (*Evens & Howard Fire Brick Co. v. U. S.* 236, U. S., at 211), and that Court is, therefore, now powerless to permit the petitioner to intervene and as a matter of fact, as is alleged in said petition, said District Court has refused to permit another stockholder to intervene for the purpose of establishing the very same right that petitioner herein asks for upon the sole ground that it ceased to have jurisdiction to permit intervention as soon as the application for a writ of certiorari had been made (Par. 45).

Unless, therefore, this Court grants the relief asked for, petitioner will not be able to intervene and share his part of the expenses of this litigation and share in the relief which the Court decreed for his benefit as a stockholder similarly situated with the plaintiff.

In such case, if he can get any relief at all, it will be only after having again tried out the entire cause of action upon its merits in a new action which he might be able to institute. This

would certainly involve much expense and great delay. The present case cannot possibly be reached for argument in this Court before the October, 1918 term, and long before that time, plaintiff can have proven the truth of the matters set out in its petition, and have been made a party to share in the benefits of the judgment if it shall be affirmed by this Court, or in case of reversal, bear its share of the costs of this litigation.

Since the decrees referred to above, there has been no change in the situation of all the parties to the litigation. The Southern Pacific Company has not complied with the decree by turning over any of said stock and there has been no performance of any part of the original decree and the situation of all the parties hereto remains exactly the same as it has always been.

POINT I.

This Court has power to permit the intervention asked.

That the petitioner should obtain the benefits of the judgment in the case at bar without having to incur the expenses and delay necessary to again prove the same cause of action already proven in the case at bar, seems clear from the wording of Equity Rule 38, under which the action was brought.

That Rule reads:

“When the question is one of common or general interest to many persons constitut-

ing a class so numerous as to make it impracticable to bring them all before the Court, one or more may sue or defend for the whole."

As the case is before this Court on certiorari and the Trial Court, therefore, divested of further jurisdiction, it is apparent that the petitioner can only obtain this relief by application to this Court.

Equity Rule 37 controls the question of intervention in the United States Courts. The latter part of that rule reads:

"Anyone claiming an interest in the litigation may *at any time* be permitted to assert his right by intervention but the intervention shall be in subordination to and in recognition of the priority of the main proceeding."

It is apparent from this that this Court has express authority to grant the intervention prayed for, if it shall see fit to do so.

Possibly the leading case upon this subject in this Court is the case of *Evens & Howard Brick Co. v. United States*, 224 U. S., 383, where this court issued its mandate that certain necessary steps be taken to make the organization of the defendants a legal one under the Anti-Trust Act. The United States, as plaintiff, filed the mandate in the District Court and asked an interlocutory decree giving the time fixed by the Supreme Court for the defendant to take steps necessary to make its organization legal. As a result of steps taken by the defendants to comply with said mandate the final decree was entered on March 2nd, 1914. This decree was objected to by the United States

because of the insufficiency of the steps taken by the defendants for the purpose of complying with the mandate of the Supreme Court and on March 27th, 1914, the United States appealed from said final decree. After this appeal petitions to be allowed to intervene were filed in the District Court on behalf of the Evens & Howard Fire Brick Company and others all based on the ground that the petitioner would suffer great injury by the serious loss occasioned to their business as the result of said final decree. This was denied by the District Court on the ground that the Court was without jurisdiction because of the appeal taken by the United States. Thereupon the petitioners filed a petition in this Court praying leave to be allowed to intervene and asking a modification of said final decree. The petitioners were allowed to intervene and in 236 U. S., at 199, it is said:

“The challenge by the United States of the right to hear the intervening petitioners is without merit, since *even although the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree* in so far as it might operate prejudicially to their rights.”

and also in 236 U. S., at page 211, in passing on the appeal taken by the petitioners from the decision of the District Court refusing them permission to intervene in the lower Court, this Court said:

“This appeal was taken from the order of the court refusing to allow an intervention on the ground that there was no jurisdiction to do so because as the result of a previous final decree and an appeal taken therefrom

by the United States, the authority of the court over the subject-matter was ended. In effect *the relief* which was sought to be accomplished by the intervention below *has been obtained as the result of an original petition for intervention here and our action this day taken thereon*. As those applying to intervene were not parties to the record, we are of the opinion that the court below had no power to allow them to intervene under the circumstances which existed and its judgment refusing their application was therefore right."

In *United States v. Northern Securities Company*, 128 Federal 808, an application to intervene was made after the final decree had been affirmed by the Supreme Court of the United States, the application being made in the lower Court. At page 810, it is said:

"Applications for leave to intervene in a case after the entry of a final decree are very unusual. They are never granted as a matter of course, and, owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted *unless it is necessary to do so to preserve some right which cannot otherwise be protected, or to avoid some complication that is liable to arise*."

This case distinctly recognizes the right to intervene after final decree and after an appeal to the Appellate Court has been decided.

In *Foster*, Federal Practice, Section 259, p. 833, it is said:

"A petition of intervention may be filed at *any stage* of the cause, *even after a final decree*."

In *Brooks v. Gibbons*, 4 Paige, 373, a suit was brought by complainant on behalf of himself and all other creditors against an Executrix and devisees of the decedent for the account of the estate and for the satisfaction of their debts out of the same. It appeared that a similar suit had been commenced against the defendants by other creditors, in which the usual decree had been made in favor of the complainants in that suit, and also for the benefit of all other creditors who might come in under the decree. The complainant alleged that he had no knowledge of the proceedings in the former suit until after the expiration of the time limited by the Master for the creditors to come in and prove their debts and after the final decree. The Chancellor dismissed the Bill without costs and without prejudice to the rights of the complainant to intervene in the former proceeding and prove his debt under the former decree.

We submit, furthermore, that as a matter of law, the petitioner was really a party complainant in this action at all times by representation and that therefore this motion is not a question of bringing in a new party or adding a new complainant, but is merely to add the petitioner's name to the record so that there can be no question of his taking the benefit of the decree already entered in his favor.

A very valuable discussion of the effect of the decree in class suits will be found in *Streets Federal Equity Practice*, Vol. 1, Ch. 12, Sec. 539, et seq. In Section 549 it is said:

"It has always been understood in the English Chancery, and apparently in the equity courts of this country, that the decree

in class suits is binding on all persons in interest whether they are actually before the court or not; at least this is so where the interest of those persons is properly represented before the court. Those who are actually before the court as plaintiffs or defendants are considered and treated as being the proper legal representatives of those who are absent but who are in like interest. The true class suit in fact supplies an instance of virtual representation. When the court once gets jurisdiction over the subject-matter, it will proceed to clean up every element of the controversy, as it affects each and every party in interest; and to this end all that is necessary is that the different persons in interest shall be before the court either in person or by representation. It is obvious that the court, before proceeding against parties who are such by representation only, will take care to see that all are properly and fairly represented. This has always been fully insisted on. Granting that the idea of proceeding against, or on behalf of, parties who are such by representation only is a valid one,—and that it is based on a sound principle of jurisprudence is obvious from the fact that in many cases justice could not otherwise be administered,—it follows that *a decree entered in a class suit must of necessity be valid and binding as to all. Those who are represented are concluded in the same degree and to the same extent as are those who are actually before the Court.* This is a rational and just conclusion, and it has the sanction of the established usage of the English chancery. *The jurisdiction of the court over the subject-matter enables the court to determine the rights of all persons to the property, provided only they are sufficiently represented before the court."*

One of the earliest cases (*Handford v. Storie*) is to be found in 2 Simon's and Stuart's Reports (in Chancery) 196, decided in 1825. In this case one holder of a debenture had filed a bill in behalf of himself and all other debenture holders against the maker thereof, praying for an account and payment. After the institution of his suit and while it was pending he sold his own debenture to the maker upon advantageous terms and thereupon consented that the bill be dismissed before any decree was made upon it, and the bill was accordingly dismissed. Subsequently another debenture holder, on behalf of himself and other debenture holders, filed a bill against the complainant in the former action, praying that such complainant re-pay to the Trustees the money he had received in order that it might be distributed under the trust deed. The Court held that where a plaintiff files a bill on behalf of himself and all other persons of the same class he retains the absolute dominion of the suit until the decree and may dismiss the bill at his pleasure; but after a decree he cannot deprive the other persons of the same class of the benefits of the decree; the Vice Chancellor saying in conclusion:

“The reason for the distinction is, that before Decree no other person of the class is bound to rely upon the diligence of him who has first instituted his Suit, but may file a Bill of his own; and that, *after a Decree, no second Suit is permitted.*”

In *Brinkerhoff v. Bostwick*, 99 N. Y. 185, the Court also held that in a representative or class action a judgment when taken was for the benefit of all the stockholders and the rights of the other stockholders or parties to the action by representation at once attach to the judgment. The Court said:

"In this case, therefore, it was not necessary that the other plaintiffs be joined as nominal plaintiffs. The suit could have gone to judgment without their presence as nominal plaintiffs and *the judgment would have been just as effectual and just as beneficial for them as if they had been actually named as parties plaintiffs.*"

POINT II.

This court has power to modify the decree by directing that after affirmation upon the merits of the plaintiff's cause of action, that the matter shall be referred by the district court to a master to permit other stockholders similarly situated with the plaintiff who may be willing to come in and contribute to the expenses to prove their claims and directing for this purpose that reasonable notice of such hearing be given.

The following cases fully support this statement:

In *Trustees of Wabash & Erie Canal Co. v. Beers*, 2 Black, 450, one of the holders of a series of \$200,000. of bonds on a certain portion of the Erie Canal brought an action to establish the priority of his bonds over other liens subsequently authorized by legislative enactment. This court held that the entire issue of \$200,000 was a first lien and *of its own volition remanded the case with directions to refer it to a master to ascertain who the other bondholders were and to notify them to come in and share in the fruits of the decree on paying their proportion of its expense.* At p. 457, the court said:

"But plaintiff has brought his suit in behalf of himself and other bondholders of the same class. The record affords strong reason to believe that the other one hundred and ninety-eight bonds of the same issue, are outstanding, with arrears of interest unpaid to the same extent as plaintiffs, yet the decree makes no provision for them. This we think is error.

"The bill in this case must be treated as in the nature of a creditor's bill, although not strictly of that class. The decree should declare the equality of lien of all these bondholders with plaintiff, and should provide for them the same relief which it gives to him. And the case should be referred to a master to ascertain who these bondholders are, about which we presume there will be little difficulty, and to notify them to come in and share in the fruits of the decree, on paying their proportion of its expense.

"For this purpose the case is remanded to the Circuit Court, with instructions to proceed in accordance with this opinion."

In *Johnson v. Waters*, 111 U. S. 640, the decree in a class case had been entered without giving any opportunity to persons similarly situated to intervene in the action and this Court modified the decree of the Court below and provided that the case should be referred to a Master who should give three months' public notice by advertisement to all creditors to appear before him and to establish their debts. At page 673 it is said:—

"We think that the latter part of the decree ought to be modified. The bill was filed by William Gay in behalf of himself and of all others, creditors of Oliver J. Morgan,

* * *

who shall come in and seek relief

by and contribute to the expense of this suit.' In other words, it is a creditor's bill filed on behalf of the complainant and of all other creditors that choose to come in and share the expenses, for the purpose of securing the due administration and application of a trust fund, namely, the estate belonging to the succession of Oliver J. Morgan, deceased. On such a bill it is the usual and correct course to open a reference in the master's office and to give other creditors, having valid claims against the fund, an opportunity to come in and have the benefit of the decree.'

In *Continental Trust Co. et al. v. Toledo, St. L. & K. C. R. Co.*, 82 Federal, at page 646, it is said by Taft, J.:

"The motion for an order requiring the Master in the creditor's suit to advertise the hearing of claims against the railroad company, and fixing the time of their presentation in his office, and the time for objections to the same, in accordance with the usual practice in a proceeding by general creditors' bill, is granted. The order ought to have been made at a much earlier time in the proceedings, but it is not too late now. Such a course is expressly approved by the Supreme Court of the United States in Trustees v. Beers, 2 Black, 457; In re Howard, 9 Wall. 175; Johnson v. Waters, 111 U. S. 674, 4 Sup. Ct. 619; Coal Co. v. McCreery, 141 U. S. 476, 12 Sup. Ct. 28. The proper course to be taken is described in 2 Daniell, Ch. Prac. (Eng. Ed. 1837-40) 854."

Also see *Matter of Howard*, 9 Wallace 175.

Martin v. Rainwater, 56 Fed. 7, 10-11.

POINT III.

It is respectfully submitted that petitioner be made a party to this action, or given permission to apply to the District Court to be made a party and for amendment of the judgment so as to include petitioner in its benefits, or in the alternative, that if the aforesaid relief is refused, that this court, in case it sustain the right of the plaintiffs to the relief already adjudged them, shall modify the decree by directing that the action shall be referred to a master and that such notice as to this court shall seem proper be given to all stockholders similarly situated with plaintiffs to appear and establish their claims and that the district Court be directed to enter judgment for such stockholders as shall prove such claims in the same manner as the judgment has been heretofore entered in favor of the plaintiffs herein, upon such intervening stockholders contributing their share of the expenses of this petition.

Respectfully submitted,

SCOTT, GERARD & BOWERS,
Solicitors for Petitioner,
THE CORN EXCHANGE BANK.

FRANCIS M. SCOTT,
JAMES W. GERARD and
SPOTSWOOD D. BOWERS,
Of Counsel.

Supreme Court of the United States.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

AGAINST

HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action; HENRY FITCH and RUSSELL H. LANDALE, as Survivors of Committee of Stockholders; SARA ROSENFELD and ROSETTA COHN, as Executrices under the Last Will and Testament of Charles Minzensheimer and Michael Gernsheim,
Plaintiffs-Respondents.

No. 773.
October Term,
1917.

In the Matter of the Application of
THE CORN EXCHANGE BANK to be
made party to the action in this
court or given permission to ap-
ply to the District Court to be

made party and for amendment of the judgment so as to include THE CORN EXCHANGE BANK in its benefits, or in the alternative for a modification of the judgment in case the plaintiff's cause of action is affirmed,

Intervener.

Southern Pacific Company, defendant in the above-entitled action, for answer generally to the petition of the Corn Exchange Bank, alleges as follows :

I. It denies that the petitioner is a stockholder of the Houston and Texas Central Railway Company similarly situated to the plaintiffs in the action at bar.

In support of such denial it alleges that it affirmatively appears in the petition that though petitioner and its predecessor obtained title to the hundred shares of stock now owned by petitioner on May 1, 1888, and that at various times during the year 1889 and thereafter it made diligent inquiry in regard to the affairs of the Houston and Texas Central Railway Company, and was informed that said stock had no value, it fails to set out any facts as to the nature of such inquiries or the places where or persons from whom such information was sought.

The record in the case at bar shows that since 1889, one year after the entry of the foreclosure decree, and up to the present time, the stockholders' protective committee, of which plaintiffs were members, were actively engaged in the prosecution of various litigations seeking to recover on behalf of themselves and others similarly situated, being the stockholders who had deposited their stock with said committee, for the alleged wrong which they fancied they had sustained.

The suits brought by the members of such stockholders' committee or in their interest (in which neither petitioner nor anyone in its interest participated) were as follows :

1. In 1889 in the United States Circuit Court for the Eastern District of Texas an action by Stephen W. Carey and others to set aside the foreclosure decree on the ground of fraud, have the property restored to the Receiver, and for other relief.

An application was made before Judge PARDEE for preliminary injunction which was denied (*Carey v. H. T. C. Ry. Co.*, 45 Fed. Rep., 438 ; decided in 1891) and after testimony had been fully taken was tried before him and resulted in a dismissal of the bill of complaint on the merits (*Carey v. H. T. C. Ry. Co.*, 52 Fed. Rep., 71, decided in 1892).

It will be noted that Judge PARDEE affirmatively decided in this case that there was no fraud in the Reorganization Agreement and that the decree was not a consent decree, and further, that no valid defenses thereto had been withdrawn and that the Reorganization Agreement was greatly to the benefit of the stockholders of the Railway Company.

Appeals were taken from such decree both to the United States Supreme Court and to the Circuit Court of Appeals for the Fifth Circuit resulting in either dismissal of the appeal or affirmance of the decree (*Carey v. H. T. C. Ry. Co.*, 150 U. S., 170, decided in 1893 ; 9 C. C. A., 687, decided in 1894 ; 161 U. S., 115, decided in 1896).

2. In 1889 the Supreme Court of the State of New York an action by Michael Gernsheim and others to enjoin the execution of the Reorganization Agreement and the delivery of the securities authorized thereby on the ground that the reorganization and the foreclosure decree was obtained by fraud and collusion.

An injunction granted by the Special Term enjoining delivery of the stock only, was reversed by the General Term. On the actual trial of the case the Court held that as the Reorganization Plan provided that the amount to be paid by the stockholders should

be determined by the Central Trust Company and as it appeared that its Board of Trustees did not act in making the same, therefore the determination had not been regularly made in accordance with the provisions of the Reorganization Agreement (*Gernsheim v. Olcott*, 7 N. Y. Sup., 872, decided in 1889; 70 N. Y. Sup., 438, decided in 1890).

3. In 1890 in the Supreme Court of New York County an action by Michael Gernsheim and others, after new determination had been made by the Central Trust Company of New York for similar relief and reduction of the amount to be paid.

Both the Special and General Term denied the application for injunction, and the case was never brought to trial (*Gernsheim vs. Central Trust Co.*, 16 N. Y. Sup., 127, decided in 1891; 61 Hun, 625, decided in 1891).

4. In 1891 in the Supreme Court of New York County an action by Cornelius MacArdell and others, for the purpose of setting aside the foreclosure decree as fraudulent and of recovering certain of the land grants which were sold pursuant to the foreclosure decree on the theory that there was a trust for the benefit of stockholders.

This suit was decided in favor of the defendants by the Special Term, which decision was affirmed by the General Term and by the Court of Appeals. In the latter court two judges dissented upon the theory that the action should be sustained as an action by minority stockholders against the majority stockholder as trustee (*MacArdell vs. Olcott*, 104 A. D., 263, decided in 1905; 189 N. Y., 368, decided in 1907).

5. One Sillocks, a member of the stockholders' committee, moved for leave to intervene in the MacArdell case, and this was denied for laches, and it was pointed out that he could prove his claim after interlocutory and before final decree (*MacArdell vs. Olcott*, 62 A. D., 127, decided in 1901).

6. In 1903 in the Supreme Court of Nassau County an action by Walter B. Lawrence, subsequently removed to the United States District Court for the Eastern

District of New York, the prayer for relief was identical to that in the suit at bar, except that it was not sought herein to recover the land grants. The District Court held that it was a derivative action in the right of the H. T. C. Railway Company, the original company, and that such corporation was, therefore, an indispensable party. The suit was dismissed for lack of jurisdiction upon failure of the plaintiffs to bring in the Railway Company as a party defendant (*Lawrence vs. Southern Pacific Railway Co.*, 165 Fed. Rep., 241, decided in 1908; 177 Fed. Rep., 547, decided in 1910; 180 Fed. Rep., 822, decided in 1910).

An appeal to this court from said decree was dismissed for lack of jurisdiction (*Bogert vs. Southern Pacific Railway Co.*, 228 U. S., 137, decided in 1913).

7. In 1913 the present action was brought in the United States District Court for the Eastern District of New York by the plaintiffs as Executors of Walter B. Lawrence, which, though the prayer is identical with the old Lawrence case except as to the land grants, the Court has held by reason of certain minor changes in the complaint, to be an action brought by the plaintiffs as individual stockholders and not in the right of the corporation and consequently have held that the suit can be prosecuted without the presence of the original corporation which could not be served in the jurisdiction in which the action was brought.

Originally a motion to dismiss was made upon the pleadings which was denied (*Bogert v. Southern Pacific Railway Co.*, 211 Fed. Rep., 776), and thereafter certain separate defenses which had been set up were separately tried and the Court overruled the same (*Bogert v. Southern Pacific Railway Co.*, 215 Fed. Rep., 218, 226), granting leave to present them again upon the trial of the main issue. The main issue was thereafter tried and the court found for the plaintiffs, entering an interlocutory decree (*Bogart v. Southern Pacific Railway Co.*, 226 Fed. Rep., 520). After taking certain testimony before a Master, a final decree was entered. Prior to the entry of said final decree the plaintiffs, other than the Lawrence executors,

made applications to intervene and such applications were granted. An appeal was taken to the Circuit Court of Appeals which affirmed the decree, Judge Hough dissenting on certain points (*Bogart v. Southern Pacific Railway Co.*, 244 Fed. Rep., 61). Application was made to this court for a writ of *certiorari* which application was recently granted. No hearing in this court has yet been had.

II. In discussing the affirmative defenses the Court in the case at bar overruled the defense of laches upon the express ground that the activities indicated in the above mentioned suits were sufficient to show that those claiming through the stockholders' committee had been at all times active in endeavoring to protect their rights, though their proceedings had been brought upon a different theory from that which the court decided was involved in the case at bar, using the following language :

" They have been striving for many years to recover. No acquiescence but exactly the contrary, a continuous and vigorous protest appears. * * * It would be most inequitable to forfeit the complainant's rights notwithstanding the very long and unusual delay in prosecuting them."

III. Petitioner alleges that it had no knowledge of the Reorganization Agreement until February, 1908.

The record in the case at bar shows that during the late eighties and early nineties this Reorganization Agreement and these litigations were of common knowledge in financial circles and anyone by even casual inquiry could have readily learned thereof. Particularly as to the widespread publicity given to the Reorganization Agreement, we call attention to pages 1012 to 1021 and 1070-1078 of Exhibit Bin the case at bar, which is the record in the Carey case, consisting of the testimony of Mr. James Rascovar who had charge of the publicity campaign in regard to the Reorganization Agreement, and copies of certain of notices published, which testimony shows that thousands of dollars were spent in giving that reorganiza-

tion widespread notoriety in an attempt to call its features to the attention of anyone who could possibly be interested therein and that the main features of the Plan and Agreement were extensively advertised numerous times during 1888, 1889 and 1890, in well-known newspapers, both financial and otherwise, of general circulation and of wide publicity, so that if petitioner failed to obtain knowledge of the reorganization this was entirely by reason of its own neglect and inertia.

The record further shows that the notice fixing the amount to be paid by stockholders so as to entitle them to participate in the reorganization was given to the stockholders by advertisements (Carey Record, Ex. B, p. 1035, Gernsheim Record, Ex. D, pp. 29, 82-83, 320).

IV. The individuals who were admitted by the court below as parties plaintiff made due applications after interlocutory but before final decree, in accordance with the proper and regular rules of practice and established law in that regard, and it appears that the court fully considered their situation and their activities and the applicability of the various defenses pleaded in the defendant's answer before admitting them.

V. To sum up, therefore, the defendant, Southern Pacific Company, alleges that petitioner is not similarly situated to plaintiffs.

1. Because it did not take any part in the various litigations instituted by the plaintiffs or by other members of the stockholders' committee which were held by the court below to be an answer to the defense of laches.

2. Because if these petitioners never heard of the Reorganization Agreement and their rights thereunder and therefore took no action until February, 1918, such inactivity was by reason of their own neglect and failure to properly investigate the situation and make reasonable inquiry in regard thereto.

3. Because plaintiffs permitted to intervene all

made application for such relief in due time as provided by law, to wit, after the entry of the interlocutory and before the entry of the final decree, and, therefore, the Court having held that they seasonably and promptly made such applications, they could not be held guilty of laches, and were entitled to share in the benefits obtained by the plaintiffs in the representative action brought by them.

VI. The record shows that Judge HUGH said in the Circuit Court of Appeals, 244 Fed. Rep., 61, (66), after discussing whether the plaintiffs had an action at law, as follows :

" It follows that the present decision holds in substance that there is no remedy at law for these plaintiffs ; that equity is the only jurisdiction for them, and that twenty-five years of failure to discover an always existing cause of action, based on facts of almost public notoriety, does not constitute laches in the absence of silence, inaction, or acquiescence by plaintiffs, or loss of advantages or change of situation caused or contributed to by plaintiffs on defendant's part."

Hence, it clearly appears that certain of the separate defenses, particularly that of laches, which have been held unavailing against the present plaintiffs, would be sustained in any separate action brought by petitioner which had no part in any of the litigations above mentioned, but has remained at all times, as shown by its own petition, silent and inactive, making no attempt to enforce "an always existing right." If petitioner be permitted to intervene herein instead of being relegated to a separate suit, defendant would be precluded from setting up such valid defenses which equity will recognize.

VII. The greater part of the petition herein consists of repetitions verbatim of the allegations made in the amended complaint in the case at bar, nevertheless the defendant deems

it proper to answer said petition in detail, and for answer thereto, it alleges as follows :

FIRST. The defendant is without knowledge and therefore denies each and every allegation contained in article "First" of the petition.

SECOND. The defendant is without knowledge and therefore denies each and every allegation contained in article "Second" of the petition.

THIRD. The defendant is without knowledge and therefore denies each and every allegation contained in article "Third" of the petition.

FOURTH. The defendant admits and alleges that it is and was a corporation organized and existing under and by virtue of the laws of the State of Kentucky ; that the Houston and Texas Central Railroad Company (hereinafter called the "Railroad Company") was and is a corporation organized and existing under and by virtue of the laws of the State of Texas ; and the Houston and Texas Railway Company (hereinafter called the "Railway Company") was and is a corporation organized and existing under and by virtue of the laws of the State of Texas.

FIFTH. The defendant admits, upon information and belief, the allegations contained in article "Fifth" of the petition.

SIXTH. Except as herein specifically admitted, the defendant denies, upon information and belief, the allegations contained in article "Sixth" of the petition. The defendant admits and alleges, upon information and belief, that at and prior to the time of the foreclosure sale referred to in the petition, the Railway Company was entitled to land grants from the State of Texas amounting, exclusive of the roadbed, right of way and lands necessary for the proper operation and maintenance of the railroad, to about 4,500,000 acres, and it further alleges, upon information and belief, that the Railway Company never received patents for any large amount of said

lands, and that the rights and claims of the Railway Company to large portions of its said land grants, as theretofore understood and claimed by it, were disputed by the Attorney General of the State of Texas, and that the Railway Company was not possessed of and did not hold or own said lands or land grants, or any of them, or any lands or land grants whatsoever, at any time subsequent to the foreclosure decree and the sales thereunder and the confirmation thereof hereinafter referred to.

SEVENTH. The defendant admits, upon information and belief, that before the date of the reorganization agreement referred to in the bill of complaint, the Railway Company had executed and delivered seven different mortgages to various trustees to secure seven different issues of bonds, and alleges upon information and belief, that the said mortgages, the trustees thereof and the amount of bonds outstanding thereunder were respectively as follows :

1. Main Line First Mortgage, dated July 1, 1866, to Shepherd Knapp and David S. Dodge as trustees, securing an issue of seven per cent. bonds due July 1, 1891, of which bonds to the aggregate principal amount of \$5,838,000 were outstanding ; Nelson S. Easton and James Rintoul having, prior to the year 1885, succeeded said Shepherd Knapp and David S. Dodge as trustees of said mortgage.

2. Western Division First Mortgage, dated December 21, 1870, to Shepherd Knapp and William Walter Phelps as trustees, securing an issue of seven per cent. bonds due July 1, 1891, of which bonds to the aggregate principal amount of \$2,226,000 were outstanding ; Nelson S. Easton and James Rintoul having, prior to the year 1885, succeeded said Shepherd Knapp and William Walter Phelps as trustees of said mortgage.

3. Waco and Northwestern Division First Mortgage, dated June 16, 1873, to The Farmers' Loan and Trust Company as trustee, securing an issue of seven per cent. bonds, due July 1, 1903, of which bonds to the aggregate principal amount of \$1,144,000 were outstanding.

4. Main Line and Western Division Consolidated Mortgage, dated October 1, 1872, to The Farmers' Loan and Trust Company as trustee, securing an issue of eight per cent. bonds, due May 1, 1915, of which bonds to the aggregate principal amount of \$4,585,000 were outstanding, including \$666,000 principal amount of the said bonds held by the trustee of the General Mortgage referred to in paragraph 7 of this article Seventh.

5. Waco and Northwestern Division Consolidated Mortgage, dated May 1, 1875, to The Farmers' Loan and Trust Company as trustee, securing an issue of eight per cent. bonds due May 1, 1915, of which bonds to the aggregate principal amount of \$567,000 were outstanding, including \$84,000 principal amount of said bonds held by the trustees of the Main Line First Mortgage referred to in paragraph I. of this article Vi. and \$483,000 principal amount of said bonds held by the trustee of the General Mortgage referred to in paragraph 7 of this article Seventh.

6. Income and Indemnity Mortgage, dated May 7, 1877, to Thomas W. House and Benjamin A. Shepherd as trustees, securing an issue of seven per cent. bonds due May 1, 1887, of which bonds to the aggregate principal amount of \$1,500,000 were outstanding, including \$1,499,000 principal amount of said bonds held by the trustee of the General Mortgage referred to in paragraph 7 of this article Seventh.

7. General Mortgage, dated April 1, 1881, to The Farmers' Loan and Trust Company as trustee, securing an issue of six per cent. bonds due April 1, 1921, of which bonds to the aggregate principal amount of \$4,305,000 were outstanding.

The defendant denies, upon information and belief, that under each of said seven mortgages, except one, bonds secured respectively by the said mortgages had been issued and were outstanding, and alleges, upon information and belief, that bonds had been issued and were outstanding under each and every of the said seven mortgages to the amounts hereinbefore set forth. The defendant denies, upon information and belief, that all or any of the bonds issued under the Income and

Indemnity Mortgage had been called in, retired or cancelled before the date of the reorganization agreement referred to in the petition, and alleges, upon information and belief, that the \$1,499,000 of the said bonds held by The Farmers' Loan and Trust Company as trustee of said General Mortgage, together with the \$666,000 of Main Line and Western Division Consolidated Mortgage bonds and the \$483,000 of Waco and Northwestern Division Consolidated Mortgage bonds held by the trustee of said General Mortgage as above set forth had been acquired and were held by said trust company as such trustee in accordance with and subject to the provisions of said General Mortgage, by the terms of which it was provided among other things as follows :

" That when any of said prior lien bonds are purchased or taken up by exchange they shall not be cancelled, or the mortgage given to secure the payment thereof discharged, until such time as the trustee herein named has the entire amount of bonds purporting to be secured under any one of the before-recited several mortgages * * * [and] that all of the prior lien bonds received in exchange for bonds issued hereunder, except as last above provided, shall be held by the trustee herein named as follows : First. As an additional security for the payment of the principal and interest of the bonds issued under this deed. Second. For the benefit and security of the Houston and Texas Central Railway Company, its successors and assigns " ;

And the defendant further alleges, upon information and belief, that all of the said Income and Indemnity Mortgage bonds were never exchanged or tendered or offered for exchange, but that at the times of the foreclosure and sale referred to in the petition at least one of said bonds still remained outstanding wholly unpaid and unexchanged, and that the Main Line and Western Division Consolidated Mortgage bonds, the Waco and Northwestern Division Consolidated Mortgage bonds and the Income and Indemnity Mort-

gage bonds against which General Mortgage bonds had been exchanged were held by The Farmers' Loan and Trust Company as trustee under said General Mortgage as additional security for the payment of the outstanding General Mortgage bonds. The defendant is without knowledge as to whether one Income and Indemnity Mortgage bond for \$500 or any other amount had been or was lost.

The defendant prays leave to refer to the several mortgages in this answer mentioned or referred to or to certified copies thereof, and denies each and every allegation contained in the petition in respect to the contents, purport and effect of the said mortgages and each of them except so far as upon reference to the said several mortgages or to certified copies thereof said allegations shall be found to be true and correct.

EIGHTH. The defendant admits, upon information and belief, that prior to the year 1883 Morgan's Louisiana and Texas Railroad and Steamship Company, a Louisiana corporation (hereinafter for brevity termed the Morgan Company) owned more than a majority of the outstanding capital stock of the Railway Company, or approximately \$4,000,000 par value of the said stock out of a total issue of \$7,726,900; that in or about the year 1883 the Southern Development Company, a California corporation (hereinafter for brevity the Development Company) acquired a majority of the capital stock of the Morgan Company, and that thereafter and in or about the year 1885 said stock of the Morgan Company was sold and transferred by the Development Company to and acquired by this defendant. Except as hereinbefore specifically admitted, the defendant denies each and every allegation contained in article "Eighth" of the petition.

NINTH. The defendant admits, upon information and belief, that in or after the year 1885, the Railway Company became involved in litigations with its secured and unsecured creditors, and that on or about February 11, 1885, two suits were brought against the Railway Company by the trustees of certain of the mortgages upon part of the property of the Railway

Company, and alleges, upon information and belief, that said suits were (1) a suit brought by Nelson S. Easton and James Rintoul, as trustees of the Main Line First Mortgage of the Railway Company, dated July 1, 1866, as complainants against the Railway Company as defendant; and (2) a suit brought by Nelson S. Easton and James Rintoul, as trustees of the Western Division First Mortgage of the Railway Company, dated December 21, 1870, as complainants against the Railway Company as defendant. The defendant further admits, upon information and belief, that each of said suits was commenced by bill in equity filed in the United States Circuit Court for the Eastern District of Texas; that on or about June 22, 1885, the Railway Company interposed answers to said bills; and that said suits were placed upon the docket of said court and numbered respectively 183 and 184; but the defendant is without knowledge as to whether or not any further proceedings were taken in said suits or either of them for a long period of time thereafter. The defendant prays leave to refer to the bills of complaint and answers in said suits or to certified copies thereof for a statement of the contents, purport and effect of said bills and answers and for the character and purpose of said suits, and denies each and every allegation contained in article "Ninth" of the petition in respect to the contents, purport and effect of said bills and answers and in respect to the character and purpose of said suits and each of them except so far as upon reference to the said bills of complaint and answers or to certified copies thereof said allegations shall be found to be true and correct.

TENTH. The defendant admits, upon information and belief, that on or about February 16, 1885, the Development Company filed a bill of complaint against the Railway Company in the United States Circuit Court for the Eastern District of Texas, and that thereafter and on or about February 20, 1885, an order was made in said suit appointing two individual receivers, to wit: Benjamin G. Clark and Charles Dillingham,

of the Railway Company and its property, but the defendant denies, upon information and belief, that said order was made upon the consent of the Railway Company, and prays leave to refer to the said order or to a certified copy thereof for a statement of the terms and provisions of the same. The defendant denies at the time of the filing of said bill of complaint or of the appointment of said receivers or at any other time a majority of the stock of the Development Company was owned by this defendant, and the defendant further denies that at the time of the appointment of said receivers or at at any other time the Development Company and the Railway Company or either of them was controlled by this defendant.

ELEVENTH. The defendant admits and alleges, upon information and belief, that on or about April 20, 1885, an amended and supplemental bill was filed by the Development Company in the said suit above referred to. The defendant prays leave to refer to the said amended and supplemental bill or to a certified copy thereof for a statement of the contents, purport and effect of the said amended and supplemental bill, and denies each and every allegation contained in article "Eleventh" of the petition herein in respect to the contents, purport and effect of said amended and supplemental bill except so far as upon reference to the same or to a certified copy thereof said allegations shall be found to be true and correct.

TWELFTH. The defendant admits, upon information and belief, that on or about July 7, 1885, the Railway Company filed its answer to the said suit of the Development Company. The defendant prays leave to refer to the said answer or to a certified copy thereof for a statement of the contents, purport and effect of the said answer, and denies each and every allegation contained in article "Twelfth" of the petition herein in respect to the contents, purport and effect of said answer except so far as upon reference to the said answer or

to a certified copy thereof said allegations shall be found to be true and correct.

THIRTEENTH. The defendant admits, upon information and belief, that on or about March 18, 1885, The Farmers' Loan and Trust Company as trustee of one or more of the seven mortgages covering the property of the Railway Company, filed its bill of complaint against the Railway Company in the United States Circuit Court for the Eastern District of Texas. The defendant prays leave to refer to the said bill of complaint or to a certified copy thereof for a statement of the contents, purport and effect of said bill and denies each and every allegation contained in article "Thirteenth" of the petition herein in respect to the contents, purport and effect of said bill or of any of the bills theretofore filed against the Railway Company except so far as upon reference to the said bills or to certified copies thereof said allegations shall be found to be true and correct.

FOURTEENTH. The defendant admits, upon information and belief, that on or about June 22, 1885, the Railway Company filed its answer to the said bill of complaint of The Farmers' Loan and Trust Company and that said suit was entered on the docket of the United States Circuit Court for the Eastern District of Texas and numbered 183. The defendant is without knowledge as to whether said suit remained on said docket at issue or as to whether any steps were taken to press the same for trial. The defendant prays leave to refer to the said answer or to a certified copy thereof for a statement of the contents, purport and effect of said answer and denies each and every allegation contained in article "Fourteenth" of the petition herein in respect to the contents, purport or effect of said answer except so far as upon reference to said answer or to a certified copy thereof said allegations shall be found to be true and correct.

FIFTEENTH. The defendant, upon information and belief, admits the allegations contained in article "Fifteenth" of the petition herein.

SIXTEENTH. The defendant admits, upon information and belief, that on or about January 21, 1886, the trustees of two mortgages covering different portions of the property of the Railway Company filed bills in equity in the United States Circuit Court for the Eastern District of Texas demanding the foreclosure of said mortgages, and alleges, upon information and belief, that said suits were (1) a suit brought by Nelson S. Easton and James Rintoul as trustees of the Main Line First Mortgage of the Railway Company, dated July 1, 1866, as complainants, against the Railway Company as defendant; and (2) a suit brought by Nelson S. Easton and James Rintoul as trustees of the Western Division First Mortgage of the Railway Company dated December 21, 1870, as complainants against the Railway Company as defendant. This defendant prays leave to refer to the said two bills of complaint or to certified copies thereof for a statement of the contents, purport and effect of the said bills of complaint and for the character and purpose of said suits, and denies each and every allegation contained in article "Sixteenth" of the petition herein in respect to the contents, purport and effect of said bills of complaint and each of them and in respect to the character and purpose of said suits and each of them except so far as upon reference to the said bills of complaint or to certified copies thereof said allegations shall be found to be true and correct.

SEVENTEENTH. The defendant admits, upon information and belief, that the Railway Company interposed answers to the bills of complaint referred to in Article "Sixteenth" of the petition herein, and that said suits were placed upon the docket of the United States Circuit Court for the Eastern District of Texas and numbered respectively 198 and 199. This defendant prays leave to refer to the said answers of the Railway Company or to certified copies thereof for a statement of the contents, purport and effect of the said answers and denies each and every allegation contained in article "Seventeenth" of the petition herein in respect to the con-

tents, purport and effect of said answers and each of them except so far as upon reference to the said answers or to certified copies thereof said allegations shall be found to be true and correct. This defendant is without knowledge as to whether any effort was made to overcome the defenses interposed by the Railway Company to the said suits, or whether any steps were taken to bring the same to a hearing.

EIGHTEENTH. The defendant admits, upon information and belief, that on or about April 24, 1886, a bill of complaint was filed by The Farmers' Loan and Trust Company as trustee of one of the mortgages covering property of the Railway Company, to wit, the General Mortgage of the Railway Company, dated April 1, 1881, against the Railway Company, in the United States Circuit Court for the Eastern District of Texas, and alleges, upon information and belief, that said suit was placed upon the docket of said court and numbered 201. This defendant prays leave to refer to the said bill of complaint or to a certified copy thereof for a statement of the contents, purport and effect of said bill, and denies each and every allegation contained in article "Eighteenth" of the petition herein in respect to the contents, purport and effect of the said bill of complaint, except so far as upon reference to the said bill or to a certified copy thereof said allegations shall be found to be true and correct.

NINETEENTH. The defendant prays leave to refer to the said mortgage to The Farmers' Loan and Trust Company as trustee and to the other mortgages referred to in the petition herein or to certified copies thereof and denies each and every allegation in article "Nineteenth" or elsewhere in the petition herein contained in respect to the contents, purport and effect of said mortgages or any of them, except so far as upon reference to said mortgages or to certified copies thereof said allegations shall be found to be true and correct.

TWENTIETH. The defendant admits, upon information and belief, that on or about September 3, 1886, the Railway Com-

pany filed its answer to the said bill of complaint of The Farmers' Loan and Trust Company referred to in article "Eighteenth" of the petition herein, and that on or about September 9, 1886, the Railway Company filed an amendment to its said answer. This defendant prays leave to refer to the said answer and amendment or to certified copies thereof for a statement of the contents, purport and effect of the said amendment and answer, and denies each and every allegation contained in article "Twentieth" of the petition herein in respect to the contents, purport and effect of the said answer and amendment and each of them, except so far as upon reference to the said answer and amendment or to certified copies thereof said allegations shall be found to be true and correct.

TWENTY-FIRST. The defendant denies, upon information and belief, that all of the suits affecting the property of the Railway Company were consolidated on May 26, 1886, and alleges, upon information and belief, that the only suits consolidated were the suits numbered 198, 199 and 201, pending against the Railway Company, and that said suits were so consolidated by an order of the United States Circuit Court for the Eastern District of Texas, filed on or about May 26, 1886, to which said order or to a certified copy thereof this defendant prays leave to refer. The defendant admits, upon information and belief, that said consolidated cause was numbered 198 upon the docket of said Court. It admits, upon information and belief, that said order of May 26, 1885, appointed Nelson S. Easton, James Rintoul and Charles Dillingham receivers in said consolidated cause of the Railway Company and its property, and that said order directed Benjamin G. Clark and Charles Dillingham, the receivers theretofore appointed in the suit brought by the Development Company, to turn over the property held by them to the receivers in said consolidated cause; but this defendant is without knowledge as to whether said receivers

appointed in the suit of the Development Company were appointed by consent or whether said receivers were discharged on May 27, 1886.

TWENTY-SECOND. The defendant admits, upon information and belief, that various pleadings were filed in said consolidated cause No. 198 by various parties thereto and that various defenses were interposed by the answers of the Railway Company. Answering the allegations of the petition as to the contents, purport and effect of said pleadings and answers, it prays to refer to the said pleadings and answers or to certified copies thereof, and denies each and every allegation in the petition contained in respect to the contents, purport and effect of the said pleadings and answers except so far as upon reference to said pleadings and answers or to certified copies thereof said allegations shall be found to be true and correct. The defendant denies, upon information and belief, that the defenses interposed by the Railway Company were never overcome in said litigation. It is without knowledge as to whether said defenses or any of them were valid or legal defenses to said suits or any of them or whether they could not be overcome save by the consent of the Railway Company or otherwise. The defendant denies that throughout all or any of the period referred to in article "Twenty-second" of the bill of complaint herein the Railway Company was controlled by this defendant. Except as hereinbefore admitted and denied, the defendant is without knowledge as to any of the matters and things alleged in article "Twenty-second" of the petition.

TWENTY-THIRD. The defendant admits that thereafter a reorganization agreement dated December 20, 1887, was entered into of which the agreement annexed to the bill of complaint herein and marked "Exhibit A" is a substantially correct copy, but the defendant denies that the said Exhibit A is in all respects a true and correct copy of the said agreement and for greater certainty prays leave to refer to the original of

said agreement to be produced upon the trial of this suit. The defendant admits that said agreement was executed by it and by Central Trust Company of New York and by the holders of a large number of bonds under certain of the mortgages of the Railway Company, and alleges, upon information and belief, that the complainant's testator never executed said agreement or became or was a party to the same. Except as hereinbefore admitted, the defendant denies, upon information and belief, the allegations contained in article "Twenty-third" of the petition herein.

TWENTY-FOURTH. The defendant denies each and every allegation contained in article "Twenty-fourth" of the petition except so far as by reference to the said reorganization agreement said allegations shall be found to be true and correct.

TWENTY-FIFTH. The defendant admits, upon information and belief, that the reorganization contemplated by said reorganization agreement was thereafter carried out, and denies, upon information and belief, that said agreement was not carried out in its provisions concerning the lands owned by the Railway Company. The defendant admits that on or about April 30, May 1, May 2 and May 3, 1888, various new pleadings and answers were filed in the United States Circuit Court for the Eastern District of Texas, and that on or about May 4 a decree of foreclosure was filed therein. The defendant prays leave to refer to the said pleadings, answers and decree and to the record in said suit or to certified copies thereof for the steps and proceedings taken therein and denies each and every allegation contained in article "Twenty-fifth" of the petition herein in respect to the contents, purport or effect of said pleadings, answers and decree and in respect to the proceedings in said suit except so far as upon reference to the said pleadings, answers said decree and to the said record or

to certified copies thereof and allegations shall be found to be true and correct.

TWENTY-SIXTH. The defendant denies the allegations contained in article "Twenty-sixth" of the petition.

TWENTY-SEVENTH. The defendant admits, upon information and belief, that pursuant to the decree of May 4, 1888, above referred to, a foreclosure sale of the property of the Railway Company was held, at which part of the property of said Railway Company, including certain of the lands of said Company, was bid in by Frederic P. Olcott, the then president of Central Trust Company of New York, acting for said trust company in pursuance of the reorganization agreement. The defendant denies, upon information and belief, that all of the property of the Railway Company was bid in by the said Olcott at said sale. The defendant admits, upon information and belief, so much of article "Twenty-seventh" of the petition as alleges as follows :

"No part of the money or bonds paid, delivered or surrendered at the said sale, for the property, bid in by the said Olcott, belonged to him, but said money and bonds were furnished under and pursuant to the said Reorganization Agreement. At said foreclosure sale, the said Olcott also bought in all the said lands owned by the said Railway Company pursuant to said Reorganization Agreement. A new railroad corporation was organized pursuant to the terms of the Reorganization Agreement which was known as the Houston and Texas Central Railroad Company. To said new Company the said Olcott transferred the lines of railroad, rolling stock, etc., purchased at said foreclosure sale. The said Railroad Company thereupon executed bonds secured by three mortgages prepared, executed and delivered in accordance with the Reorganization Agreement which bonds were delivered to the Central Trust Company and by it distributed among the bondholders who had deposited their Bonds with said Trust Company under the Reorganization Agreement."

The defendant denies that all of the bondholders of the Railway Company accepted new bonds of the Railroad Company, according to the provisions of the reorganization agreement or otherwise. The defendant admits, upon information and belief, that the lands purchased by said Olcott were transferred to certain trust companies, but the defendant denies, upon information and belief, that the said lands or any of them were transferred to the said trust companies for the benefit or use of the Railroad Company, and prays leave to refer to the instruments transferring the said lands to the said trust companies or to certified copies thereof for a statement of the contents, purport and effect of the said instruments and each of them.

TWENTY-EIGHTH. The defendant denies each and every allegation contained in article "Twenty-eighth" of the petition except that it admits that certificates representing all of the \$10,000,000 par value of capital stock of the Railroad Company except directors' qualifying shares were delivered to and acquired by this defendant in the City and State of New York, and that this defendant now holds and owns and claims to own and hold the same subject to this pledge under the French Loan agreement hereinafter mentioned ; and the defendant alleges that its said acquisition and ownership of the said stock was and is in all respects lawful and proper.

TWENTY-NINTH. The defendant admits and alleges that in order to acquire, and as part of the consideration for its acquisition of, said stock of the Railway Company, this defendant undertook to and did guarantee certain obligations of the Railroad Company, and that as required under the reorganization agreement it did pay certain expenses and charges of reorganization, amounting to not less than \$2,602,615.77. The defendant admits that it has never been called upon to pay any sum on account of its said guarantees.

THIRTIETH. The defendant denies each and every allegation contained in article "Thirtieth" of the petition.

THIRTY-FIRST. The defendant admits, upon information and belief, the allegations contained in article "Thirty-first" of the petition.

THIRTY-SECOND. The defendant is without knowledge of the matter alleged in article "Thirty-second" of the petition.

THIRTY-THIRD. The defendant denies upon information and belief, the matters alleged in article "Thirty-third" of the petition.

THIRTY-FOURTH. The defendant denies, upon information and belief, each and every allegation contained in article "Thirty-Fourth" of the petition, except that it admits that the directors of the Railway Company have not brought or caused to be brought any action against this defendant.

THIRTY-FIFTH. The defendant, upon information and belief, denies the allegations contained in article "Thirty-fifth" of the petition except that it admits and alleges, upon information and belief, that in or about the year 1888 an action was brought in the Supreme Court of the State of New York, in and for the County of New York, by Michael Gernsheim, Eugene A. Loeb and Albert Loeb, suing on behalf of themselves and such other stockholders of the Railway Company similarly situated, who might come in and contribute to the expense of said action, as plaintiffs, against this defendant and the Railway Company and others as defendants, and that thereafter various proceedings were had in said action resulting in favor of the defendants therein, but for greater certainty this defendant prays leave to refer to the record in said action or to a certified copy thereof for a statement of the several proceedings therein.

THIRTY-SIXTH. The defendant, upon information and belief, denies the allegations contained in article "Thirty-sixth" of the petition except that it admits and alleges, upon information and belief, that in or about the month of August, 1890,

an action was brought in the Supreme Court of the State of New York, in and for the County of New York, by Michael Gernsheim, Eugene A. Loeb and Albert Loeb, suing on behalf of themselves and such other stockholders of the Railway Company similarly situated who might come in and contribute to the expenses of said action, as plaintiffs, against this defendant and the Railway Company and others as defendants, and that thereafter various proceedings were had in said action resulting in favor of the defendants therein, but for greater certainty this defendant prays leave to refer to the record in said action or to a certified copy thereof for a statement of the several proceedings therein.

THIRTY-SEVENTH. The defendant admits and alleges, upon information and belief, that in or about the month of August, 1891, an action was brought in the Supreme Court of the State of New York, in and for the County of New York, by Cornelius MacArdell, suing on behalf of himself and such other stockholders of the Railway Company similarly situated who might come in and contribute to the expenses of said action, as plaintiff, against this defendant and the Railway Company and others as defendants. The defendant prays leave to refer to the complaint in said action or to a certified copy thereof for a statement of the contents, purport and effect of said complaint and of the relief therein demanded, and denies each and every allegation contained in article "Thirty-seventh" of the petition herein in respect to the contents, purport and effect of the complaint in the action brought by the said MacArdell or in respect to the relief therein demanded except so far as upon reference to said complaint said allegations shall be found to be true and correct. The defendant is without knowledge as to whether the said MacArdell was a member of the committee of stockholders referred to in the bill of complaint herein or of any committee of stockholders of the Railway Company or whether any such committee ever in fact existed or exists or whether said action was

brought in the interest of any such committee or of any committee. The defendant admits that said action was brought by the said MacArdell on behalf of himself and of other stockholders of the Railway Company similarly situated, and alleges, upon information and belief, that neither the petitioner nor any other stockholder of the Railway Company ever intervened or sought to intervene as a party plaintiff in said action except that in or about the month of March, 1901, the said action having then been pending for nearly ten years without having been brought to trial, a motion was made in said action by one Warren S. Sillocks, claiming to be a stockholder of the Railway Company, for leave to intervene as a party plaintiff in said action, which said motion was denied on the ground of laches.

THIRTY-EIGHTH. The defendant admits and alleges that said action brought by the said MacArdell was tried in March, 1902, at Special Term of the New York Supreme Court in and for the County of New York, but it denies that said action was brought on for trial in due course, and alleges that the trial of said action was unreasonably and unduly delayed by the plaintiff therein, and that said action was not brought on for trial for more than ten years after the same had been begun. The defendant admits that thereafter various proceedings were had in said action, substantially as alleged in article "Thirty-eighth" of the petition herein, resulting in a judgment in favor of the defendants in said action, but for greater certainty this defendant prays leave to refer to the record in said action or to a certified copy thereof and denies each and every allegation contained in article "Thirty-eighth" of the petition herein in respect to the proceedings in said action except so far as upon reference to the record in said action or to a certified copy thereof said allegations shall be found to be true and correct.

THIRTY-NINTH. The defendant admits that in or about the month of February, 1908, an action was brought by Walter B.

Lawrence, suing on behalf of himself and such other stockholders of the Railway Company similarly situated who might come in and contribute to the expenses of said action, as plaintiff, against this defendant and others as defendants. The defendant prays leave to refer to the complaint in said action or to a certified copy thereof for a statement of the contents, purport and effect of said complaint and of the relief therein demanded, and denies each and every allegation contained in article "Thirty-ninth" of the petition herein in respect to the contents, purport and effect of the complaint in the action brought by the said Lawrence or in respect to the relief therein demanded except so far as upon reference to said complaint or to a certified copy thereof said allegations shall be found to be true and correct. The defendant is without knowledge as to whether the said Lawrence was a member of the committee of stockholders referred to in the bill of complaint herein or of any committee of stockholders of the Railway Company or whether any such committee ever in fact existed or exists. The defendant admits that various proceedings were had in said action brought by the said Lawrence, substantially as alleged in article "Thirty-ninth" of the petition herein, resulting in a judgment in favor of the defendants in said action, but for greater certainty this defendant prays leave to refer to the record in said action and denies each and every allegation contained in article "Thirty-ninth" of the petition herein in respect to the proceedings in said action except so far as upon reference to the record in said action or to a certified copy thereof said allegations shall be found to be true and correct.

FORTIETH. The defendant begs leave to refer to the complaint in the action at bar, which will be found in the record, for the allegations contained therein and for the parties thereto and the capacity in which they sued. It denies that the plaintiff therein sued in conjunction with Henry Fitch and Russell H. Landale, as survivors of the Committee of Stock-

holders. Except as above defendant has no knowledge of the allegations contained in Article "Fortieth" of the petition.

FORTY-FIRST. The defendant alleges that the petitioners fail in article "Forty-first" of the petition to set out substantial portions of the interlocutory decree therein mentioned and prays leave to refer to the original thereof as shown in the record of the case at bar for the contents and provisions of said interlocutory decree. It further alleges that if the petitioner had no knowledge of said judgment until the month of February, 1918, such lack of knowledge was the result of its own laches and inaction and any consequences flowing to the petitioner therefrom are chargeable to such inaction and laches. It denies that the shares of stock of the Houston & Texas Central Railroad Company by said judgment decreed to be held in trust are of a value in excess of \$350 per share. Except as above alleged, explained or denied, it has no knowledge of the allegations contained in article "Forty-first" of the petition, and therefore denies the same.

FORTY-SECOND. Defendant alleges that the applications of the execrtrices of Charles Minzensheimer and of Michael Gernsheim were duly made to the United States District Court for the Eastern District of New York at a time when said court had jurisdiction of the action at bar and the subject matter thereof, to wit, prior to the entry of the final decree, and that proof was duly taken as to the allegations contained in said petitions and the defendant's answer and defenses thereto and the status of petitioners and said proofs were duly considered by the court and judicially passed upon prior to the making and entry of the order admitting said petitioners as parties defendant. Said order constituted a judicial determination of the status of petitioners.

FORTY-THIRD. Defendant alleges that important portions of the final decree entered in the suit at bar are omitted from the statement of the contents of such decree as set forth in article "Forty-third" of the petition and begs leave to refer to a

complete and correct copy of said decree as contained in the record before this Court in the case at bar for the terms and provisions thereof.

FORTY-FOURTH. The defendant admits that an appeal was taken from said final decree to the Circuit Court of Appeals and said decree was affirmed, Judge HOUGH dissenting in part from such affirmance, and that this Honorable Court granted a writ of *certiorari* on or about November 23, 1917, and said action is now pending for hearing before this Court. It admits that application was made after affirmance by the Circuit Court of Appeals, to the District Court, by a stockholder for leave to intervene as a party plaintiff and that such application was denied by the District Court. Except as above admitted or alleged, it has no knowledge of the allegations contained in article "Forty-fourth" of the petition.

FORTY-FIFTH. The defendant has no knowledge of the allegations contained in article "Forty-fifth" of the petition. It alleges that if petitioner and its predecessor in title was at the time said stock was acquired ignorant of the matters set forth in paragraphs of the petition numbered "Fifth" to "Thirty-first" that such ignorance was due to its own laches and inactivity, as the happenings therein set forth were, as stated by Judge HOUGH, at the time they took place, matters of public notoriety which could have been ascertained by even casual inquiry from the proper parties, and if petitioner and its predecessors in title has no knowledge of the matters referred to in paragraphs "Fifth" to "Thirty-ninth" of said petition said lack of knowledge was due solely to its own inactivity and laches. Defendant alleges that the proceedings upon the reorganization and the various litigations in regard thereto were matters of public knowledge and could have been ascertained by reasonable inquiry and the failure of the petitioner to obtain such knowledge was due solely to its own neglect and laches. Defendant further points out that petitioner carefully refrains from giving any information as to the nature of its

"diligent inquiry" and the persons from whom such information was sought.

FORTY-SIXTH. Defendant has no knowledge as to the allegations contained in article "Forty-sixth" of the petition. It begs leave to call attention to the fact that it affirmatively appears from such paragraph that information coming to petitioner as to matters set forth in the petition was not acquired by it by reason of any inquiry or activity on its behalf. It came to it unsought and as a result of an application of a customer for a loan, thus clearly showing the lack of activity and of effort on behalf of petitioner to ascertain or protect its interest in the stock in question and evidencing an acquiescence in all that had been done.

FORTY-SEVENTH. Defendant has no knowledge of the allegations contained in article "Forty-seventh" of the petition, but denies that the petitioner has used due diligence in making the necessary inquiries or otherwise.

FORTY-EIGHTH. Defendant is advised that the allegations contained in article "Forty-eighth" except as to no previous application are conclusions of law and that it is not called upon to answer the same.

FORTY-NINTH. Defendant alleges that the petitioner is not similarly situated to the plaintiffs, and that justice and equity requires petitioner should be compelled to duly prove its cause of action, and that it will be unfair and inequitable to permit it to intervene herein, as such relief would thus deprive the defendant of good and valid defenses to said alleged cause of action available to it against said petitioners, which the Courts have held by reason of their activities and otherwise could not be maintained against the plaintiffs herein.

VIII. It is submitted that it would be inequitable and unfair to the defendant, Southern Pacific Company, to permit the petitioner to intervene herein or to grant it the alternative relief prayed for, because were this done, the defendant South-

ern Pacific Company would be precluded from setting up valid defenses, which, though held unavailing against the plaintiffs in the case at bar, would, by reason of the different position held by the petitioner and its silence and inaction prevail against it and be a complete answer to its claim for relief.

IX. It is further submitted that the case at bar is not one in which a fund is in the possession or under the control of the court and is not one in which the decree entered sought to distribute such fund to the exclusion of persons equitably entitled to share therein. The shares of stock which the defendant obtained under the Plan of Reorganization were never taken possession of by the court. Both the interlocutory and final decrees entered in the case at bar made provision for stockholders of the Old Company similarly situated.

WHEREFORE the defendant Southern Pacific Company prays that the petition be denied in all respects and that the petitioner be not allowed either to intervene herein or be granted any other of the relief prayed for.

SOUTHERN PACIFIC COMPANY,

by

Hugh Keill

Secretary,

Defendant-Appellant.

Arthur W. Van Dusen
Emmett J. Van Dusen

Counsel for Defendant-Appellant,

No. 54 Wall Street,

New York City,

N. Y.

STATE OF NEW YORK, }
 County of New York, } ss. :

HUGH NEILL, being duly sworn, deposes and says that he is the Secretary of Southern Pacific Company, the defendant-appellant in the above-entitled cause ; that he has read the foregoing answer and knows the contents thereof ; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sworn to before me this 31st }
 day of May, 1918.

Hugh Neill

Thomas F. Dougherty

(Notarial Seal.)

Notary Public No. 104,

New York County.

TO SCOTT, GERARD & BOWERS,

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Attorneys for Plaintiffs-Respondents.

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Supreme Court of the United States

OCTOBER TERM 1917.

No. [REDACTED] 805

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,
against

HENRY L. BOGERT, TOWNSEND LAWRENCE and
ANITA LAWRENCE, as Executors under the Last Will
and Testament of Walter B. Lawrence, deceased, suing on
behalf of themselves and other stockholders of the Houston
& Texas Central Railway Company, similarly situated, who
may come in and contribute to the expenses of this action;
HENRY FITCH and RUSSELL H. LANDALE, as Sur-
vivors of Committee of Stockholders; SARA ROSEN-
FELD and ROSETTA COHN, as Executrices under the
Last Will and Testament of Charles Minzensheimer and
Michael Gernsheim,

Plaintiffs-Respondents.

In the Matter
of the

Application of HENRY J. CHASE, for leave to come in and
contribute to the expenses of this action for the amendment
of the judgment herein or for leave to apply to the District
Court for the amendment of the judgment, or in the alter-
native, for modification of the judgment in case the plain-
tiffs' cause of action is affirmed,

Intervener.

PETITION.

HENRY A. UTERHART,
Attorney for Petitioner,
Henry J. Chase,
Office and P. O. Address,
27 Cedar Street,
Borough of Manhattan,
New York City.



Supreme Court of the United States 1

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

against

HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action; HENRY FITCH and RUSSELL H. LANDALE, as Survivors of Committee of Stockholders; SARA ROSENFELD and ROSETTA COHN, as Executrices under the last Will and Testament of Charles Minzensheimer and Michael Gernsheim,
Plaintiffs-Respondents.

In the Matter
of the

Application of HENRY J. CHASE, for leave to come in and contribute to the expenses of this action for the amendment of the judgment herein or for leave to apply to the District Court for the amendment of the judgment, or in the alternative, for modification of the judgment in case the plaintiffs' cause of action is affirmed,

Intervener.

October Term, 2
1917. No. 773.

To the Supreme Court of the United States:

The petition of Henry J. Chase to this Honorable Court respectfully shows:

FIRST.—That your petitioner is a resident of Glen Rock, State of New Jersey, and prays for leave to come in and contribute to the expenses of this action as a stockholder of the Houston & Texas Central Railway Company, and for the amendment of the judgment herein, or for leave to apply to the District Court for the Eastern District of New

- 4 York for the amendment of the judgment herein, or, in the alternative, that this Court in case it affirms the judgment appealed from and sustains the right of the plaintiffs to the relief asked for, shall modify the decree of the Court below by directing that your petitioner may establish his claim against the defendant in the same manner as judgment has been entered in favor of the plaintiffs herein upon his contribution of his share of the expenses of this litigation and petition.

- 5 SECOND.—That this is an action instituted by certain minority stockholders of the Houston & Texas Central Railway Company, suing on behalf of themselves and all other stockholders similarly situated who should come in and contribute to the expense of the action, to establish a resulting trust in favor of said stockholders to certain shares of stock of the Houston & Texas Central Railroad Company, which shares of stock it was alleged the said defendant, Southern Pacific Company had acquired and now holds in trust for said plaintiffs. The action was duly tried before the District Court of the Eastern District of New York and resulted
- 6 in favor of the plaintiffs and on the 13th day of December, 1915, an interlocutory decree was entered herein in which, among other things, it was decreed "That the defendant, Southern Pacific Company, in the year 1889, secured and still has in its possession and under its control, one hundred thousand (100,000) shares of the par or face value of ten million (\$10,000,000) dollars, of the common stock of the Houston & Texas Central Railroad Company, a corporation organized and existing under the laws of the State of Texas. That the total outstanding capital stock of the Houston &

Texas Central Railway Company was seventy-seven thousand, two hundred and sixty-nine (77,269) shares, and the said defendant, Southern Pacific Company, now has in its possession and holds (unless pledged subsequent to receipt), for the benefit of the complainants and the other stockholders of the Houston & Texas Central Railway Company, respectively, who may come in and contribute to the expenses of this action, stock of the Houston & Texas Central Railroad Company, in the following proportions: For each seventy-seven thousand two hundred and sixty-nine hundred thousandth of a share (.77269) of the stock of the Houston & Texas Central Railway Company, held by the complainants, and by the other stockholders of the said Railway Company who may come in and contribute to the expenses of this action, respectively, the defendant, Southern Pacific Company has in its possession and holds (unless pledged subsequently), for said complainant and other stockholders, one share of the capital stock of the Houston & Texas Central Railroad Company. * * * That any party may hereafter apply, upon notice to the other parties hereto, for such further order and direction as may be proper to carry out the purposes of this decree, and to be added at the foot hereof." No part of said judgment has been complied with by said Southern Pacific Company.

THIRD.—That your petitioner had no notice of said judgment and no knowledge of said judgment until some time after its rendition as hereinafter stated.

FOURTH.—After said interlocutory decree had been rendered, Sarah Rosenfeld and Rosetta Cohen

- 10 as Executrices under the Last Will and Testament of Charles Minzensheimer and Michael Gernsheim, who obtained knowledge thereof, were upon application permitted to intervene as minority stockholders who had interests similar to those of the plaintiffs.

- FIFTH.—That an appeal from said final judgment was duly taken by the defendant, now appellant herein, to the Circuit Court of Appeals for the Second District, and said judgment was in all respects affirmed. Thereupon said defendant, Southern Pacific Company, made application for a writ of certiorari for the review of such judgment by
 11 this Honorable Court, which writ was granted on or about the 23d day of November, 1917, and said action is now pending for hearing before this court and by reason thereof the District Court has no jurisdiction of said cause and has no power to grant the relief prayed for herein, viz.: to permit the intervention of petitioner in this cause and to amend the judgment as herein asked for, except by permission of this Court, which now has exclusive jurisdiction of said cause. Petitioner further avers that another stockholder after the
 12 affirmance by the Circuit Court of Appeals, made application to the District Court to be permitted to intervene in this action, but was refused such permission on the ground that the certiorari removed the cause from its jurisdiction. .

SIXTH.—That your petitioner is and has been since December 16th, 1891, a stockholder of the Houston & Texas Central Railway Company, which is represented as a party plaintiff in this action by Messrs. Henry Fitch and Russell H. Landale, as Survivors of Committee of Stockhold-

ers, and is also one of the stockholders in whose behalf the action was brought. 13

SEVENTH.—That your petitioner is and has been since December 16th, 1891, the owner of certificates 10954 and 10955, each for 50 shares of the capital stock of the Houston & Texas Central Railway Company, but that because of certain litigation which was carried on a few years after petitioner became said stockholder, your petitioner did not believe they were of much value, and as petitioner was not a party to said litigation, he did not pay any further attention to the same, and since then has no knowledge of any of the proceedings referred to in the complaint herein. 14

EIGHTH.—That on July 3d, 1917, your petitioner noticed in The New York Times that the United States Circuit Court had affirmed the decree herein, and thereupon, on July 5th, 1917, wrote to the Farmer's Loan & Trust Company, which was stated upon the certificates to be the registrar, and received from them on July 9th, 1917, a reply that they had not acted for the said company for a great many years. Your petitioner thereupon at once took steps to employ attorneys to investigate and to make the proper application to the Court to prove his ownership of the said 100 shares, and that he is informed and believes the fact to be that his attorneys prosecuted this application with the utmost diligence. 15

NINTH.—That your petitioner is further informed of a similar application which has been made herein before this Honorable Court by Francis P. O'Reilly, who is similarly situated to your petitioner by his attorneys, Scott, Gerard & Bowers.

16 TENTH.—That no other or previous application has been made to this Court, by your petitioner, for the relief prayed for herein, and no application therefor has been made to the District Court because by reason of the writ of certiorari granted by this Court, said District Court is and has been since petitioner had knowledge of the matters set forth herein, without jurisdiction of said cause, and has no power by reason thereof to grant the relief asked for herein.

17 ELEVENTH.—That if the relief herein asked for is not granted and petitioner is forced to institute a new action to obtain a judgment directing the turning over to him of said stock so held in trust for him, much time of a trial court will be consumed in proving petitioner's said cause of action and petitioner will be put to large and unnecessary expense in making proof of the same facts which have already been proven in this action.

18 WHEREFORE petitioner prays for an order of this Court granting him leave as a stockholder of the Houston & Texas Central Railway Company to come in and contribute to the expenses of this action to prove his ownership of said 100 shares of stock, and the judgment be amended so as to give him the same relief as to his said 100 shares, as is given by the judgment herein to the other owners of stock, who are already parties herein, or that petitioner be given permission to apply to the District Court for the Eastern District of New York, for leave to prove the ownership of his said 100 shares of stock, or in the alternative, that if the aforesaid relief is refused by this Honorable Court, if it should sustain the judgment appealed from, and

sustain the right of the plaintiffs to the relief asked for, shall modify the decree of the Court below by directing that the District Court be directed to enter judgment for your petitioner of the said shares of stock of the Houston & Texas Central Railway Company in the same manner as judgment has been heretofore entered in favor of the plaintiffs herein, so that your petitioner contribute his share of the expenses of the action, and petitioner prays for such other and further relief as to this Honorable Court may seem just and proper. 19

Dated: New York, May 20, 1918.

HENRY J. CHASE, 20
Petitioner.

State of New York, }
County of New York, } ss.:

Henry J. Chase, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. 21

HENRY J. CHASE.

Sworn to before me this
20th day of May, 1918.

ALFRED M. SCHAFER,
Notary Public,
Kings County.

Certificate filed in New York County.

22 SUPREME COURT OF THE UNITED STATES.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

against

HENRY L. BOGERT, TOWNSEND LAWRENCE
and ANITA LAWRENCE, as Executors under
the Last Will and Testament of
Walter B. Lawrence, deceased, suing on
behalf of themselves and other stock-
holders of the Houston & Texas Central
Railway Company, similarly situated,
who may come in and contribute to the
expenses of this action; HENRY FITCH
and RUSSELL H. LANDALE, as Survivors
of Committee of Stockholders; SARA
ROSENFELD and ROSETTA COHN, as Ex-
ecutrices under the last Will and Testa-
ment of Charles Minzensheimer and
Michael Gernsheim,
Plaintiffs-Respondents.

October Term,
1917.
No. 773.

In the Matter
of the

Application of HENRY J. CHASE, for leave
to come in and contribute to the ex-
penses of this action for the amendment
of the judgment herein or for leave to
apply to the District Court for the
the amendment of the judgment, or in
the alternative, for modification of the
judgment in case the plaintiffs' cause of
action is affirmed,

Intervener.

24

Sirs:

PLEASE TAKE NOTICE that the foregoing pe-
tition will be filed in the office of the Clerk of the
Supreme Court of the United States on or before
the 3d day of June, 1918, and application made at
that time for an order of said Court granting the
petitioner leave as a stockholder of the Houston &
Texas Central Railway Company to come in and
contribute to the expenses of this action, to prove

his ownership of 100 shares of stock, and for an amendment of the judgment, so as to give him the same relief as to his said 100 shares as is given by the judgment herein to the other owners of stock who are already parties herein, or that the petitioner be given permission to apply to the District Court for the Eastern District of this Court for leave to prove his ownership of said 100 shares, or in the alternative, that if the aforesaid relief is refused by this Honorable Court, and if it should sustain the judgment appealed from, and sustain the right of the plaintiffs to the relief asked for, for an order modifying the decree of the Court below and directing that the District Court be directed to enter judgment for the petitioner of said shares of stock in the same manner as judgment has been heretofore entered in favor of the plaintiffs herein, upon his contributing his share of the expenses of this action, together with such other and further relief as to this Honorable Court may seem just and proper.

Dated, New York, May 20th, 1918.

Yours, etc.,

HENRY A. UTERHART,
 Attorney for H. J. Chase,
 27 Cedar Street,
 Borough of Manhattan,
 City of New York.

28 To

LEWIS H. FREEDMAN, Esq.,
54 Wall Street,
New York City.

ARTHUR H. VAN BRUNT, Esq.,
54 Wall Street,
New York City,
Counsel for the above named
Defendant-Appellant. and

29

H. SNOWDEN MARSHALL, Esq.,
61 Broadway,
New York City.

A. J. DITTENHOEFER, Esq.,
32 Broadway,
New York City.

DUDLEY F. PHELPS, Esq.,
32 Broadway,
New York City,
Attorneys for Plaintiffs-Respondents.

30

SUEREME COURT OF THE UNITED STATES.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

AGAINST

HENRY L. BOGERT, TOWNSEND LAW-
RENCE and ANITA LAWRENCE, as
Executors under the Last Will
and Testament of Walter B.
Lawrence, deceased, suing on
behalf of themselves and other
stockholders of the Houston &
Texas Central Railway Company,
similarly situated, who may come
in and contribute to the expenses
of this action; HENRY FITCH and
RUSSELL H. LANDALE, as Sur-
vivors of Committee of Stock-
holders; SARA ROSENFELD and
ROSETTA COHN, as Executrices
under the Last Will and Testa-
ment of Charles Minesheimer
and Michael Gernsheim,
Plaintiff-Respondents.

October Term, 1917,
No. 773.

IN THE MATTER

OF

The Application of HENRY J. CHASE,
for leave to come in and con-
tribute to the expenses of this
action, for the amendment of the

judgment herein or for leave to apply to the District Court for the amendment of the judgment, or in the alternative, for modification of the judgment in case the plaintiffs' cause of action is affirmed,

Intervener.

Southern Pacific Company, defendant in the above entitled action, for answer to the petition of Henry J. Chase, alleges as follows :

FIRST. It has no knowledge of the residence of petitioner.

It alleges that the relief prayed for in the first article of the petition should not be granted because petitioner, though at the present time apparently a stockholder of the Houston & Texas Central Railway Company (hereinafter for brevity called the " Railway Company "), is not similarly situated to the plaintiffs in the action at bar, and in support of such allegation it alleges that it affirmatively appears in the petition that the petitioner did not acquire the said stock of the Railway Company until December, 1891—over three years after the happening of the events complained of and subsequent to the commencement of many of the litigations instituted on behalf of the Stockholders' Committee and others for the purpose of securing their fancied rights—hence the conclusion is irresistible that the stock was acquired for speculative purposes. That this is the case is further evidenced by the significant failure of the petitioner to set forth that he had no knowledge of the litigations instituted by Gernsheim, Carey, McArdell and others, fully set forth in this defendant's answer to the petition of intervention of the Corn Exchange Bank submitted herewith.

It further affirmatively appears in the petition, and par-

ticularly by article Seventh thereof, that petitioner knew of certain of the litigations pending or concluded at or about the time he purchased the stock and by reason of his belief that the same would not result advantageously he did not attempt to intervene therein nor make any other effort to protect his so-called rights. It further appears that though owning the stock in question from December, 1891, it was not until July, 1917, that he took any steps whatsoever to protect his fancied interests and to recover on what Judge HOUGH calls "an always existing cause of action based on facts of almost public notoriety." It seems to follow that he has been guilty of silence, inaction and acquiescence and by reason thereof is not similarly situated to the plaintiffs and should not be entitled to participate in any recovery had by them, particularly because the court overruled the separate defenses of laches and inaction raised by the answer in the case at bar upon the ground that the inactivity of the Stockholders' Committee in the suits instituted by it and with its approval was sufficient to show that those claiming through such committee had been at all times active through upon an erroneous theory.

By reason of the fact that the answer to the petition of the Corn Exchange Bank sets forth in detail the litigations instituted on behalf of the Stockholders' Committee and others and the facts in respect to the reorganization and other matters, this defendant begs leave to refer to said answer as though the same was made a part hereof, but refrains from annexing the same, to bring the record herein within narrow compass.

SECOND. For the nature of the action herein, the relief demanded and the issues involved, the provisions of the interlocutory decree, the date of entry thereof, and the provisions of the final decree and the date of entry thereof, this defendant refers to the record in the case at bar. It alleges that the same are improperly set forth in Article Second of the petition and except as such allegations are substantiated by said

record it denies the same as found in Article Second of the petition.

THIRD. It alleges that it is immaterial whether petitioner had notice of said judgment or knowledge thereof until some time after its rendition and that if such be the fact such lack of knowledge is occasioned solely by plaintiff's activity, inaction and laches.

FOURTH. It admits and alleges that after interlocutory decree and before final decree, the executrices of Charles Minzensheimer and one Michael Gernsheim were upon application duly permitted to intervene as parties plaintiff in the action at bar. It denies that the interests of said intervenors are similar to those of petitioner. It further alleges that such applications were made to the trial Court at a time when said court had jurisdiction of the action at bar and the parties thereto, to wit, prior to the entry of the final decree and that proof was duly taken as to the allegations contained in said petition and the defendants' answers and defenses thereto, and said proofs were duly considered by the court and judicially passed upon prior to the making and entry of the order admitting said petitioners as parties defendant; that said order constituted a judicial determination of the status of petitioners.

FIFTH. Defendant refers to the record in the case at bar for details of the proceedings therein subsequent to the entry of the interlocutory decree and alleges that the allegations contained in Article Fifth of the petition sets out only a small portion of such facts and many pertinent and relevant facts are omitted therefrom. Except as the allegations contained in Article Fifth are substantiated by the record herein, defendant denies the same.

SIXTH. Defendant denies that the Houston & Texas Central Railway Company is represented in the action at bar by Messrs. Henry Fitch and Russell H. Landale as survivors of a committee of stockholders and also denies that petitioner is one of the stockholders in whose behalf the action at bar was brought.

Defendant further points out that if petitioner did not acquire his stock until December 16, ~~1887~~¹⁸⁸⁸, such stock was acquired long subsequent to the happening of the wrongs complained of, and after the institution of a large amount of litigation on behalf of the Stockholders' Committee and others; that even with knowledge of such alleged wrong and the pending of such litigation petitioner took no steps whatsoever to protect his fancied interests, but remained quiescent and inactive until July, 1917, over twenty-five years after he had acquired the stock in question.

SEVENTH. Defendant has no knowledge of the allegations contained in Article Seventh of the petition, but calls attention to the fact that it affirmatively appears therefrom that petitioner acquired his stock long subsequent to the promulgation of the Reorganization Agreement, the declaration of the same as operative, the entry of the foreclosure decree in 1888, the taking place of the sale thereunder, the institution of the litigations by Gernsheim and Carey and the decision of many points therein, and that with such knowledge of his rights and the pending action petitioner took no steps whatsoever to protect such rights but remained inactive and quiescent until July, 1917; that such inactivity and quiescence prevents any recovery at this late date, on the part of petitioner.

EIGHTH. Defendant has no knowledge of the allegations contained in Article Eighth of the petition.

NINTH. Defendant admits that application for intervention herein has been made on behalf of Francis P. O'Reilly but denies that said O'Reilly is similarly situated to petitioner and refers to its answer to the petition of said O'Reilly filed herewith.

TENTH. Defendant admits no previous application has been made by petitioner for the relief prayed for in said petition. Except as above admitted, it is advised that the balance of article tenth of the petition are allegations of matters of law and it is not called on to make answer to the same.

ELEVENTH. Answering the allegations of Article Eleventh defendant alleges that the petitioner is not similarly situated to the plaintiffs in the case at bar,

1. Because he did not take any part in the various litigations instituted by plaintiffs and by other members of the Stockholders' Committee which were held by the court below to be an answer to the defense of laches.

2. Because petitioner was fully aware of the provisions of the Reorganization Agreement and his rights thereunder from the time of the purchase of his stock in December, 1891, and the litigations then pending, yet took no steps whatsoever to protect his alleged rights, but remained inactive and quiescent until July, 1917.

3. Because such stockholders as have been permitted to intervene as parties plaintiff all made application for relief in due time as provided by law, to wit, after the entry of the interlocutory and before the entry of the final decree, and therefore the Court having held that they seasonably and promptly made such applications, they could not be held guilty of laches, and were entitled to share in the benefits obtained by the plaintiffs in the representative action brought by them; and that justice and equity requires petitioner should be compelled to prove his cause of action and that to permit petitioner to intervene herein, or to grant it the alternative relief prayed for, would be unfair and inequitable, as the granting of such relief would deprive the defendants of good and valid defenses to said alleged cause of action available to it against such petitioner, which the courts have overruled as to the plaintiffs herein, solely upon the ground that their activity in the suits particularly enumerated in the answer to the petition of the Corn Exchange Bank, though misdirected, was a sufficient answer to the defense of laches.

TWELFTH. This defendant further submits that the case at bar is not one in which a fund is in the possession or under

the control of the court, and is not one in which the decree entered sought to distribute such fund to the exclusion of persons equitably entitled to share therein. The shares of stock which the defendant obtained under the Plan of Reorganization were never taken possession of by the court. Both the interlocutory and final decrees entered in the case at bar made provision for stockholders of the Railway Company (the old company) similarly situated.

WHEREFORE the defendant Southern Pacific Company prays that the petition be denied in all respects, and that the petitioner be not allowed either to intervene herein or be granted any other relief prayed for.

SOUTHERN PACIFIC COMPANY,

By

HUGH NEILL,

Secretary,

Defendant-Appellant.

ARTHUR H. VAN BRUNT,

LEWIS H. FREEDMAN,

Counsel for Defendant-Appellant,

No. 54 Wall Street,

New York City, N. Y.

STATE OF NEW YORK, }
 County of New York, } ss.:

HUGH NEILL, being duly sworn, deposes and says that he is the Secretary of Southern Pacific Company, the defendant-appellant in the above-entitled cause; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

HUGH NEILL.

Sworn to before me this 31st }
 day of May, 1918. }

THOMAS F. DOUGHERTY,
 (Notarial Seal.) Notary Public, No. 104,
 New York County.

To HENRY A. UTERHART, Esq.,
 Attorney for Petitioner,
 No. 27 Cedar Street, New York City, N. Y.
 H. SNOWDEN MARSHALL, Esq.,
 No. 61 Broadway, New York City, N. Y.,
 A. J. DITTENHOEFER, Esq.,
 32 Broadway, New York City, N. Y.,
 DUDLEY F. PHELPS, Esq.,
 32 Broadway, New York City, N. Y.,
 Attorneys for Plaintiffs-Respondents.

Supreme Court of the United States

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

against

HENRY L. BOGERT, TOWNSEND LAWRENCE
and ANITA LAWRENCE, as Executors under
the Last Will and Testament of
Walter B. Lawrence, deceased, suing on
behalf of themselves and other stock-
holders of the Houston & Texas Central
Railway Company, similarly situated,
who may come in and contribute to the
expenses of this action; HENRY FITCH
and RUSSELL H. LANDALE, as Survivors
of Committee of Stockholders; SARA
ROSENFELD and ROSETTA COHN, as Exec-
utrices under the Last Will and Tes-
tament of Charles Minzensheimer and
Michael Gernsheim,

Plaintiffs-Respondents.

In the Matter

of

The Application of HENRY J. CHASE, for
leave to come in and contribute to the
expenses of this action for the amend-
ment of the judgment herein, or for
leave to apply to the District Court for
the amendment of the judgment, or in
the alternative for modification of the
judgment in case the plaintiffs' cause of
action is affirmed.

October Term
1917.

No.

305

BRIEF IN SUPPORT OF PETITION AND MOTION OF HENRY J. CHASE, INTERVENOR.

Statement.

This is an application for intervention by a
stockholder similarly situated to the plaintiffs for
leave to come in and contribute to the expenses of

the action, to prove his ownership of 100 shares of stock of the Houston and Texas Central Railway Company, and for an amendment of the judgment so as to give him the same relief as is given to the other owners of stock, or in the alternative for permission to apply to the District Court for the Eastern District of this Court for leave to prove his ownership of the said 100 shares.

The extraordinary situation in the case at bar has led to this application rather than a new expensive and lengthy action to secure an adjudication of what has already been litigated herein.

This is a minority stockholders' action of the Houston and Texas Central Railway Company, suing on behalf of themselves and other stockholders similarly situated who may come in and contribute to the expenses of this action, to establish a trust ex maleficio of certain shares of stock acquired by the Southern Pacific Company through one of its subsidiaries, which was the majority stockholder of the Texas Company.

The first knowledge the petitioner herein had of the present action was after the decree of the District Court had been affirmed by the Circuit Court of Appeals for the Second District (Petition, Par. 8). Thereupon petitioner's attorney made an investigation and ascertained that in this present action an interlocutory decree was entered on December 13, 1915, wherein it was decreed

"That the defendant, Southern Pacific Company, in the year 1889, secured and still has in its possession and under its control, one hundred thousand (100,000) shares of the par or face value of ten million (\$10,000,-

000) dollars, of the common stock of the Houston & Texas Central Railroad Company, a corporation organized and existing under the laws of the State of Texas. That the total outstanding capital stock of the Houston & Texas Central Railway Company was seventy-seven thousand two hundred and sixty-nine (77,269) shares, and the said defendant, Southern Pacific Company, now has in its possession and holds (unless pledged subsequent to receipt), for the benefit of the complainants and the other stockholders of the Houston & Texas Central Railway Company, respectively, who may come in and contribute to the expenses of this action, stock of the Houston & Texas Central Railroad Company, in the following proportions: For each seventy-seven thousand two hundred and sixty-nine hundred thousandth of a share (77,269), of the stock of the Houston & Texas Central Railway Company, held by the complainants, and by the other stockholders of the said Railway Company who may come in and contribute to the expenses of this action, respectively, the defendant, Southern Pacific Company has in its possession and holds (unless pledged subsequently), for said complainant and other stockholders, one share of the capital stock of the Houston & Texas Central Railroad Company. * * * That any party may hereafter apply, upon notice to the other parties hereto, for such further order and direction as may be proper to carry out the purposes of this decree, and to be added at the foot hereof."

No part of said judgment has been complied with by the Southern Pacific Company.

Unless the present application is granted, petitioner will have to institute a new action to prove his ownership of his 100 shares of stock, and will have to consume the time of the Court in proving exactly what has been litigated herein, whereas if this motion is granted petitioner can be allowed to intervene before the appeal is heard on the merits at the October, 1918, Term.

POINT ONE.

In a suit brought by a member of a class on behalf of himself and others similarly interested, another member of the class who desires the success of the complaint, can always intervene even after a decree, provided there has been no distribution of the assets, upon payment of his share of the costs, expenses and reasonable counsel fees, which have been previously paid or incurred.

*Foster's Federal Practice, Fifth Edition,
Section 258, page 822.*

Equity Rule 37 applies to intervention in this Court, and reads in part as follows:

"Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention but the intervention

shall be in subordination to and in recognition of the priority of the main proceeding."

Even before this rule was adopted in 1912, persons belonging to a class were regarded as quasi-parties and often allowed to intervene.

Gasquet vs. Fidelity Trust & Safety Vault Co., 58 Fed., 80 at 83.

There have been instances in this court where, after a final decree, members of a class were allowed to intervene.

United States vs. Northern Securities Co., 128 Fed., 808.

The reasoning of the Court in that action is expressly applicable in the case at bar because there will be no delay, since the petitioner can prove his ownership, and the formal orders can be entered before the case is heard on its merits in October.

There are at least two applications similar to that of the petitioner before this Court, and it is respectfully suggested that an order be made herein directing that suitable notice be given to any other stockholder who may have been unfortunate enough not to have heard of the present case. Under this procedure, the entire controversy would be finally settled without a new, expensive and lengthy litigation. An almost similar course was approved in

Continental Trust Co. vs. Toledo, St. L. & K. C. R. Co., 82 Fed., at page 646.

POINT TWO.**Conclusion.**

The application of the petitioner should be granted and he should be allowed to come in and contribute to the expenses of this action, to prove his ownership of 100 shares of stock of the Houston & Texas Central Railway Company, and the judgment should be amended so as to give him as to his said 100 shares as is given by the judgment herein to the other owners of stock who are already parties herein, or in the alternative, the petitioner be given permission to apply to the District Court for the Eastern District of New York, to prove his ownership of his said shares of stock, and for the entry of judgment for the petitioner of said shares of stock in the same manner as judgment has been heretofore entered in favor of the plaintiffs herein, upon his contributing his share of the expenses in this action.

Respectfully submitted,

HENRY A. UTERHART,

Attorney for Petitioner,

Henry J. Chase,

Office & P. O. Address,

27 Cedar Street,

Borough of Manhattan,

New York City.

HENRY A. UTERHART,

ALFRED M. SCHAFER,

of Counsel.

Supreme Court of the United States

October Term, 1905

10-10-05

SOUTHERN PACIFIC COMPANY

Respondent

vs.

EMORY A. ROBERTS, Respondent

Applicant

WILLIAM T. ROBERTS, Respondent

Applicant

of the Southern Pacific Company

Respondent

Applicant

of the Southern Pacific Company

Respondent

Applicant

of the Southern Pacific Company

Respondent

Applicant

of the Southern Pacific Company

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of the Southern Pacific Company

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of the Southern Pacific Company

Respondent

Applicant

of the Southern Pacific Company

Respondent

Applicant

of the Southern Pacific Company

Respondent

Applicant

of the Southern Pacific Company

Supreme Court of the United States.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

against

HENRY L. BOGERT, TOWNSEND LAWRENCE and
ANITA LAWRENCE, as Executors under the
Last Will and Testament of Walter B.
Lawrence, deceased, suing on behalf of
themselves and other stockholders of the
Houston & Texas Central Railway Com-
pany, similarly situated, who may come in
and contribute to the expenses of this ac-
tion; HENRY FITCH and RUSSELL H. LAN-
DALE, as Survivors of Committee of Stock-
holders; SARA ROSENFELD and ROSETTA
COHN, as Executrices under the Last Will
and Testament of Charles Minzensheimer
and Michael Gernsheim,
Plaintiffs-Respondents.

No. 773.
October
Term,
1917.

IN THE MATTER OF THE APPLICATION

—of—

FRANCIS P. O'REILLY,

For the Amendment of the judgment herein
or for leave to apply to the District Court
for the amendment of the judgment or in
the alternative for modification of the judg-
ment in case the plaintiff's cause of action
is affirmed.

Your petitioner, FRANCIS P. O'REILLY, a
resident of the City of Reading, in the State of
Pennsylvania, and temporarily residing in
France, praying for the amendment of the judg-

- 4 ment herein or for leave to apply to the District Court for the Eastern District of New York for the amendment of the judgment herein, or in the alternative that this Court, in case it sustain the right of the plaintiffs to the relief asked for, shall modify the decree of the Court below by directing that the action shall be referred to a Master, and that three months of public advertisement, or such other suitable notice as to this Honorable Court shall seem proper, be given to all the stockholders similarly situated with plaintiffs to appear before said Master and establish their claims against the defendant and that the District Court
- 5 be directed to enter judgment for such stockholders as shall prove their claims, or as shall prove the ownership of additional stock of the Houston & Texas Central Railway Company beyond that which they may have already proven in the case at bar, in the same manner as judgment has been entered in favor of the plaintiffs herein upon their contributing their share of the expenses of this litigation and petition, respectfully represents:

- 6 **FIRST:** This action is an action instituted by certain minority stockholders of the Houston & Texas Central Railway Company, suing on behalf of themselves and all other stockholders similarly situated who should come in and contribute to the expense of the action, to establish a resulting trust in favor of said stockholders to certain shares of stock of the Houston & Texas Central Railroad Company, which shares of stock it was alleged the said defendant, Southern Pacific Company had acquired and now holds in trust for said plaintiffs. The action was duly tried before the District Court of the Eastern District of New

York and resulted in favor of plaintiffs and on 7
the 13th day of December, 1915, an interlocutory
decree was entered herein in which, among other
things, it was decreed: "That the defendant,
Southern Pacific Company, in the year 1889, se-
cured and still has in its possession and under its
control, one hundred thousand (100,000) shares of
the par or face value of ten million (\$10,000,000)
dollars, of the common stock of the Houston &
Texas Central Railroad Company, a corporation
organized and existing under the laws of the State
of Texas. That the total outstanding capital
stock of the Houston & Texas Central Railway 8
Company was seventy-seven thousand, two hun-
dred and sixty-nine (77,269) shares, and the said
defendant, Southern Pacific Company, now has in
its possession and holds (unless pledged subse-
quent to receipt), for the benefit of the complain-
ants and the other stockholders of the Houston &
Texas Central Railway Company, respectively,
who may come in and contribute to the expenses
of this action, stock of the Houston & Texas Cen-
tral Railroad Company, in the following propor-
tions: For each seventy-seven thousand two hun-
dred and sixty-nine hundred thousandth of a
share (.77269) of the stock of the Houston & 9
Texas Central Railway Company, held by the
complainants, and by the other stockholders of
the said Railway Company who may come in and
contribute to the expenses of this action, respect-
ively, the defendant, Southern Pacific Company
has in its possession and holds (unless pledged
subsequently), for said complainant and other
stockholders, one share of the capital stock of the
Houston & Texas Central Railroad Company. . . .
That any party may hereafter apply, upon notice

10 to the other parties hereto, for such further order and direction as may be proper to carry out the purposes of this decree, and to be added at the foot hereof." No part of said judgment has been complied with by said Southern Pacific Company.

SECOND: No notice of said judgment was given or ordered to be given to petitioner by publication or otherwise, and petitioner had no knowledge of such judgment until the time hereinafter stated.

11 The shares of stock so decreed to be held in trust are now of a value in excess of \$350 a share and if petitioner is granted the relief asked for he will be entitled to receive from said Southern Pacific Company stock of a value in excess of \$280,000., in addition to the stock he is already entitled to receive under said judgment, as hereinafter stated upon the payment of a small sum of money.

12 THIRD: After said interlocutory decree had been rendered, Sarah Rosenfeld and Rosetta Cohen as Executrices under the Last Will and Testament of Charles Minzensheimer and Michael Gernsheim, who obtained knowledge thereof, were upon application permitted to intervene as minority stockholders who had interests similar to those of the plaintiffs.

FOURTH: That an appeal from said final judgment was duly taken by the defendant, now appellant herein, to the Circuit Court of Appeals for the Second District, and said judgment was in all respects affirmed. Thereupon said defendant, Southern Pacific Company made application for a writ of certiorari for the review of such judgment by this Honorable Court, which writ

was granted on or about the 23rd day of November, 1917, and said action is now pending for hearing before this court and by reason thereof the District Court has no jurisdiction of said cause and has no power to grant the relief prayed for herein, viz.: to permit the intervention of petitioner in this cause and amend the judgment as herein asked for, except by permission of this Court, which now has exclusive jurisdiction of said cause. Petitioner further avers that another stockholder after the affirmance by the Circuit Court of Appeals, made application to the District Court to be permitted to intervene in this action, but was refused such permission on the ground that the *certiorari* removed the cause from its jurisdiction.

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FIFTH: Petitioner is one of the stockholders of the Houston & Texas Central Railway Company who is represented as a party plaintiff in this action by Messrs. Henry Fitch and Russell H. Landale, as Survivors of Committee of Stockholders, and is also one of the stockholders in whose behalf the action was brought.

SIXTH: Petitioner is and has been since the year 1883 a stockholder of the Houston & Texas Central Railway Company. As said stockholder Petitioner deposited on January 31, 1890, 1200 shares of the stock of the said corporation with the Committee of Stockholders of said company of whom the said plaintiffs, Henry Fitch and Russell H. Landale are the surviving members. At and shortly before said date the stockholders of said Houston & Texas Central Railway Company felt that a proposed reorganization of said Houston & Texas Central Railway Company, by means

15

- 16 of a consent by the majority stockholders to a decree in a foreclosure action instituted by certain bondholders, which was in process of being carried out, was in violation of the rights of the minority stockholders, and was entirely for the benefit of the defendant-appellant, the Southern Pacific Company. After efforts made out of Court had failed to secure an abandonment of such proposed reorganization, litigation in behalf of the minority stockholders was begun by Stephen W. Carey and other stockholders of said Houston & Texas Central Railway Company, having for its
- 17 object the prevention of the carrying out of said foreclosure action and the entering of said consent decree. In or about the month of December, 1889, an injunction restraining the prosecution of said foreclosure action and the entering of said consent decree, was duly issued in said action and shortly thereafter and in or about the months of May, June and September, 1890, your Petitioner acquired 600 additional shares of the stock of said corporation and shortly after acquiring said stock, the said injunction was set aside and the case was tried in the year 1892, and decided against the plaintiffs, and upon appeal to the Supreme Court of the United States, said decision
- 18 was affirmed in the year 1896.

SEVENTH: At the time Petitioner deposited his said 1200 shares of stock, he had his securities in several different places and through an oversight, as a result thereof, he failed to deposit 200 shares of stock of said Houston & Texas Central Railway Company, which he then owned and which had become separated from the 1200 shares deposited by him and at the time of its deposit, he supposed he had deposited the entire amount of such stock which he then owned. That after the

dissolution of said injunction in said Carey suit, 19
 Petitioner did not deposit the said 600 shares of
 stock acquired subsequent to his said first deposit,
 because of the fact that he supposed that as a re-
 sult of said injunction being set aside and said
 litigation lost that said stock had ceased to have
 any value, and that there was no use in so deposit-
 ing it.

EIGHTH: That since said date, Petitioner has
 had no knowledge of any of the proceedings re-
 ferred to in the complaint herein, and had no
 knowledge of the action herein until after the af-
 firmance of the decree herein by the Circuit Court 20
 of Appeals in the summer of 1917, and the appli-
 cation to this court for a writ of certiorari. That
 in or about the month of November, 1917, Peti-
 tioner, who has been residing in France the
 greater part of every year since 1890 and since
 the outbreak of the war has been almost contin-
 uously in France, received information of said
 decree and of the affirmance by the Circuit Court
 of Appeals and of the application for a writ of
 certiorari and at once took steps to employ attor-
 neys to make the proper application to the Court
 to prove his ownership of said 800 shares of stock
 and that he is informed and believes the fact to be 21
 that his attorneys prosecuted this application
 with the utmost diligence.

NINTH: That no other or previous application
 has been made to this Court for the relief prayed
 for herein and no application therefor has been
 made to the District Court because by reason of
 the writ of certiorari granted by this Court, said
 District Court is and has been since petitioner had
 knowledge of the matters set forth herein, without
 jurisdiction of said cause, and has no power by
 reason thereof to grant the relief asked for herein.

22 TENTH: That if the relief herein asked for is not granted and petitioner is forced to institute a new action to obtain a judgment directing the turning over to him of said stock so held in trust for him, much time of a trial court will be consumed in proving petitioner's said cause of action and petitioner will be put to large and unnecessary expense in making proof of the same facts which have already been proven in this action.

23 WHEREFORE, petitioner prays an order of this Court, giving him an opportunity to prove before a Master his ownership of said additional eight hundred shares of stock and thereupon that the judgment should be amended so as to give him the same relief as to said eight hundred shares of stock as is given by the judgment herein to the petitioner and other owners of stock of said Houston & Texas Central Railway Company, or that petitioner be given permission to apply to the District Court for the Eastern District of New York for leave to prove the ownership of said eight hundred shares of stock and for the amendment of the judgment herein so as to give him the same relief as to said eight hundred shares of stock

24 as is given by the judgment herein to the petitioner and other owners of stock of said Houston & Texas Central Railway Company, or in the alternative that if the aforesaid relief is refused that this Court, in case it sustains the right of the plaintiff to the relief asked for, shall modify the decree of the Court below by directing that the action shall be referred to a master and that three months' public advertisement or such other suitable notice as to this Honorable Court shall seem proper, be given to all stockholders similarly situated with plaintiff, to appear before said

Master, and that the District Court be directed to enter judgment for such stockholders as shall prove their claims or shall prove the ownership of additional stock of the Houston & Texas Central Railway Company to that which they may have already proven in the case at bar, in the same manner as judgment has been heretofore entered in favor of the plaintiffs herein upon such intervening stockholders contributing their share of the expenses of this petition, and petitioner prays for such other and further relief as to this Honorable Court may seem just or proper. 25

FRANCIS P. O'REILLY, 26
By HENRY FITCH,
His Agent.

STATE OF NEW YORK, }
County of New York, } ss.:

HENRY FITCH, being duly sworn, deposes and says that he is the Agent for Francis P. O'Reilly, and is familiar with the facts set forth in the foregoing petition. That he has read the same and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. That the reason he makes this verification in place of petitioner, Francis P. O'Reilly, is that said Francis P. O'Reilly is out of the country, being now in France. 27

HENRY FITCH.

Sworn to before me, this }
13th day of May, 1918. }

GEORGE MAURER,

Notary Public, Kings County.

Certificate filed in New York County. (Seal)

28 SUPREME COURT OF THE UNITED STATES

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

against

29 HENRY L. BOGERT, TOWNSEND LAWRENCE and
ANITA LAWRENCE, as Executors under the
Last Will and Testament of Walter B.
Lawrence, deceased, suing on behalf of
themselves and other stockholders of the
Houston & Texas Central Railway Com-
pany, similarly situated, who may come in
and contribute to the expenses of this ac-
tion; HENRY FITCH and RUSSELL H. LAN-
DALE, as Survivors of Committee of Stock-
holders; SARA ROSENFELD and ROSETTA
COHN, as Executrices under the Last Will
and Testament of Charles Minzensheimer
and Michael Gernsheim,
Plaintiffs-Respondents.

No. 773
October
Term,
1917.

IN THE MATTER OF THE APPLICATION

—of—

30 FRANCIS P. O'REILLY,

For the Amendment of the judgment herein
or for leave to apply to the District Court
for the amendment of the judgment or in
the alternative for modification of the judg-
ment in case the plaintiff's cause of action
is affirmed.

SIRS:—PLEASE TAKE NOTICE that we shall on
or before the 3rd day of June, 1918, file in the

office of the Clerk of the Supreme Court of the United States the foregoing petition for an order of said Court giving petitioner an opportunity to prove before a Master his ownership of 800 additional shares of stock to that already proven in the case at bar by him, and thereupon that the judgment shall be amended so as to give him the same relief as to said 800 shares of stock as is given by the judgment herein to the petitioner, or that petitioner be given permission to apply to the District Court for the Eastern District of New York for leave to prove the ownership of said 800 shares of stock, and for the amendment of the judgment herein so as to give him the same relief as to said 800 shares of stock as is given by the judgment herein to the petitioner, and other owners of stock of said Houston & Texas Central Railway Company, or in the alternative, that if the aforesaid relief is refused, that the Supreme Court, in case it sustains the right of the plaintiffs to the relief asked for, shall modify the decree of the Court below by directing that the action shall be referred to a Master and that three months' public advertisement, or such other suitable notice as to this Honorable Court shall seem proper be given to all stockholders similarly situated with the plaintiff to appear before said Master, and that the District Court be directed to enter judgment for such stockholders as shall prove their claims or shall prove the ownership of additional stock of the Houston & Texas Central Railway Company in addition to that which they may have already proven in the case at bar, in the same manner as judgment has been heretofore entered in favor of the plaintiffs herein, upon

- 34 such intervening stockholders contributing their share of the expenses of this petition.

Dated, May 13, 1918.

Yours, etc.,
 SCOTT, GERARD & BOWERS,
 Attorneys for Francis P. O'Reilly,
 46 Cedar Street,
 Borough of Manhattan,
 New York City.

To:—

- 35 LEWIS H. FREEDMAN, Esq.,
 54 Wall Street,
 New York City.

ARTHUR H. VAN BRUNT, Esq.,
 54 Wall Street,
 New York City.

Counsel for the above-named Defendant-Appellant; and

H. SNOWDEN MARSHALL, Esq.,
 61 Broadway,
 New York City.

- 36 A. J. DITTENHOEFER, Esq.,
 32 Broadway,
 New York City.

DUDLEY F. PHELPS, Esq.,
 32 Broadway,
 New York City.

Attorneys for Plaintiffs-Respondents.

Supreme Court of the United States,

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,
against


HENRY L. BOGERT, TOWNSEND LAWRENCE
and ANITA LAWRENCE, as Executors un-
der the Last Will and Testament of
Walter B. Lawrence, deceased, suing on
behalf of themselves and other stock-
holders of the Houston & Texas Central
Railway Company similarly situated
who may come in and contribute to the
expenses of this action, HENRY FITCH
and RUSSELL H. LANDALE, as Survivors
of Committee of stockholders, SARA
ROSENFELD and ROSETTA COHN, as Ex-
ecutrices under the Last Will and Tes-
tament of Charles Minzensheimer and
Michael Gernsheim,
Plaintiffs-Respondents,

IN THE MATTER OF THE APPLICATION
OF

FRANCIS P. O'REILLY,

For the Amendment of the judgment here-
in or for leave to apply to the District
Court for the amendment of the judg-
ment or in the alternative for modifica-
tion of the judgment in case the plain-
tiffs' cause of action is affirmed.

Intervener.

No.  305
Oc
Term,
1917.

Brief in Support of Petition of Francis P. O'Reilly.

We are not unmindful that this petition is an
unusual one to make to this Court even though

the authorities hereinafter cited clearly support the right of this Court to grant the relief asked for.

We have filed this petition because in this way only can the petitioner obtain that relief to which he is entitled under the very extraordinary facts existing in the case at bar, without resorting to an expensive and lengthy proceeding in equity in which the time of the Courts and the money of our client would be expended in establishing the same general cause of action as has already been established in the case at bar.

This action was brought by a minority stockholder of the now defunct Houston & Texas Central Railway Company suing in behalf of himself and all other stockholders thereof similarly situated, who should come in and contribute to the expenses of the action. The action was in equity against the Southern Pacific Company to establish a resulting trust in and to certain shares of stock of the Houston & Texas Central Railroad Company, which the Southern Pacific Company had acquired and now holds as a result of a very vicious betrayal of the rights of the minority stockholders of said Houston & Texas Railway Company by the majority stockholder thereof, which was a company controlled by the defendant and which acted in its interest. Although the petitioner had deposited certain shares of stock (1200) of the Houston & Texas Central Railway Company with the stockholders committee, which stock was represented by the survivors of the committee of stockholders, plaintiffs in this action, nevertheless petitioner, who had his securities in different places, did not, through an oversight, deposit 200 shares additional which he held at the time (Petition, Par. 7).

Petitioner after his first deposit of stock, acquired 600 shares additional (Petitioner, Par. 6).

After that date the action commenced by the minority stockholders restraining the foreclosure action of certain bondholders and the reorganization proposed, etc., was finally decided against the majority stockholders in this Court (in the year 1896) and petitioner believed that after the decision of said foreclosure suit the stock was valueless and, therefore, did not deposit any additional shares. Since the date of said decision in this Court in 1896, the Petitioner has had no knowledge of any of the proceedings in this action until after the affirmance of the decree in the Circuit Court of Appeals, and the application to this Court for a writ of certiorari, and in November, 1917, when petitioner first learned of said affirmance and application. Petitioner, who has resided almost continuously in France since the war, immediately took steps to employ attorneys to make the proper application to this Court and prove his ownership of said 800 shares of stock (Petition, Pars. 6, 7, 8). *The plaintiffs have been successful in said action and an interlocutory decree was entered herein upon the 13th day of December, 1915, in which it was decreed that the defendant, Southern Pacific Company in the year 1889 secured and still has in its possession and holds for the benefit of the complainants and other stockholders of the Houston & Texas Central Railway Company, respectively, who may come in and contribute to the expenses of this action, stock of the Houston & Texas Central Railroad Company in the following proportion, viz.: One (1) share of stock of the Houston & Texas Central Railroad Company for every*

.77469 shares of stock of the Houston & Texas Central Railway Company (par. 1).

Although the authorities hold that it is the duty of the Court under such circumstances to direct a reference and give reasonable notice to other stockholders of their right to be made a party upon proving their ownership of stock (See cases cited under Point II *infra*), *no notice of this decree was given or ordered to be given to petitioner by publication or otherwise. As a result thereof petitioner, who owns eight hundred shares of the stock of said Houston & Texas Central Railway Company in addition to that which he deposited with the committee in 1890, which stock could upon the payment of a small sum of money be exchanged under said decree for stock of the Houston & Texas Central Railroad Company worth upwards of \$280,000 (Par. 2), had no knowledge of said decree until by the merest chance it heard of it after the writ of certiorari herein had been granted by this Court.*

Two minority stockholders who were more fortunate, than petitioner, in some way obtained knowledge of said decree before final judgment and made application to be made parties herein and were duly admitted by the District Court as parties and made proof of their stock ownership, and were included in the final judgment subsequently entered in this action on the 5th day of October, 1916 (Par. 3). This judgment found that all the allegations of the petitioner were true and that the Southern Pacific Company held said stock in trust, as aforesaid (Par. 1).

Thereupon an appeal was taken to the Circuit Court of Appeals for the Second Circuit and was on or about the 2nd day of July, 1917, in all re-

spects affirmed, and shortly thereafter application was made to this court for a writ of certiorari and on or about the 23rd day of November, 1917, a writ of certiorari was duly granted by this Court and the action is now pending for hearing before this Court.

The granting of the writ of certiorari herein took this action entirely out of the jurisdiction of the lower Court (*Evens & Howard Fire Brick Co. v. U. S.* 236, U. S., at 211), and that Court is, therefore, now powerless to permit the petitioner to intervene and as a matter of fact, as is alleged in said petition, said District Court has refused to permit another stockholder to intervene for the purpose of establishing the very same right that petitioner herein asks for upon the sole ground that it ceased to have jurisdiction to permit intervention as soon as the application for a writ of certiorari had been made (Par. 4).

Unless, therefore, this Court grants the relief asked for, petitioner will not be able to prove his ownership of his other 800 shares of said stock and in such case, if he can get any relief at all, it will be only after having again tried out the entire cause of action upon its merits in a new action which he might be able to institute. This would certainly involve much expense and great delay. The present case cannot possibly be reached for argument in this Court before the October, 1918 term, and long before that time, plaintiff can have proven the truth of the matters set out in its petition, and have been made a party to share in the benefits of the judgment if it shall be affirmed by this Court, or in case of reversal, bear its share of the costs of this litigation.

Since the decrees referred to above, there has been no change in the situation of all the parties to the litigation. The Southern Pacific Company has not complied with the decree by turning over any of said stock and there has been no performance of any part of the original decree and the situation of all the parties hereto remains exactly the same as it has always been.

POINT I.

This Court has power to grant the relief asked.

That the petitioner should obtain the benefits of the judgment in the case at bar without having to incur the expenses and delay necessary to again prove the same cause of action already proven in the case at bar, seems clear from the wording of Equity Rule 38, under which the action was brought.

That Rule reads:

“When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, one or more may sue or defend for the whole.”

As the case is before this Court on certiorari and the Trial Court, therefore, divested of further jurisdiction, it is apparent that the petitioner can only obtain this relief by application to this Court.

Equity Rule 37 controls the question of intervention in the United States Courts. The latter part of that rule reads:

"Anyone claiming an interest in the litigation may *at any time* be permitted to assert his right by intervention but the intervention shall be in subordination to and in recognition of the priority of the main proceeding."

It is apparent from this that this Court has express authority to grant the intervention even of a new party, if it shall see fit to do so.

Possibly the leading case upon this subject in this Court is the case of Evens & Howard Brick Co. v. United States, 224 U. S., 383, where this court issued its mandate that certain necessary steps be taken to make the organization of the defendants a legal one under the Anti-Trust Act. The United States, as plaintiff, filed the mandate in the District Court and asked an interlocutory decree giving the time fixed by the Supreme Court for the defendant to take steps necessary to make its organization legal. As a result of steps taken by the defendants to comply with said mandate the final decree was entered on March 2nd, 1914. This decree was objected to by the United States because of the insufficiency of the steps taken by the defendants for the purpose of complying with the mandate of the Supreme Court and on March 27th, 1914, the United States appealed from said final decree. After this appeal petitions to be allowed to intervene were filed in the District Court on behalf of the Evens & Howard Fire Brick Company and others all based on the ground that the petitioner would suffer great injury by the serious loss occasioned to their busi-

ness as the result of said final decree. This was denied by the District Court on the ground that the Court was without jurisdiction because of the appeal taken by the United States. Thereupon the petitioners filed a petition in this Court praying leave to be allowed to intervene and asking a modification of said final decree. The petitioners were allowed to intervene and in 236 U. S., at 199, it is said:

“The challenge by the United States of the right to hear the intervening petitioners is without merit, since *even although the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree* in so far as it might operate prejudicially to their rights.”

and also in 236 U. S., at page 211, in passing on the appeal taken by the petitioners from the decision of the District Court refusing them permission to intervene in the lower Court, this Court said:

“This appeal was taken from the order of the court refusing to allow an intervention on the ground that there was no jurisdiction to do so because as the result of a previous final decree and an appeal taken therefrom by the United States, the authority of the court over the subject-matter was ended. In effect *the relief* which was sought to be accomplished by the intervention below *has been obtained as the result of an original petition for intervention here and our action this day taken thereon*. As those applying to intervene were not parties to the record, we are of the opinion that the court below had no power to allow them to intervene under the circumstances which existed and its judgment refusing their application was therefore right.”

In *United States v. Northern Securities Company*, 128 Federal 808, an application to intervene was made after the final decree had been affirmed by the Supreme Court of the United States, the application being made in the lower Court. At page 810, it is said:

"Applications for leave to intervene in a case after the entry of a final decree are very unusual. They are never granted as a matter of course, and, owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted *unless it is necessary to do so to preserve some right which cannot otherwise be protected, or to avoid some complication that is liable to arise.*"

This case distinctly recognizes the right to intervene after final decree and after an appeal to the Appellate Court has been decided.

In *Foster*, Federal Practice, Section 259, p. 833, it is said:

"A petition of intervention may be filed at *any stage of the cause, even after a final decree.*"

In *Brooks v. Gibbons*, 4 Paige, 373, a suit was brought by complainant on behalf of himself and all other creditors against an Executrix and devisees of the decedent for the account of the estate and for the satisfaction of their debts out of the same. It appeared that a similar suit had been commenced against the defendants by other creditors, in which the usual decree had been made in favor of the complainants in that suit, and also for the benefit of all other creditors who might come in under the decree. The complain-

ant alleged that he had no knowledge of the proceedings in the former suit until after the expiration of the time limited by the Master for the creditors to come in and prove their debts and after the final decree. The Chancellor dismissed the Bill without costs and without prejudice to the rights of the complainant to intervene in the former proceeding and prove his debt under the former decree.

We submit, furthermore, that as a matter of law, the petitioner was really a party complainant in this action at all times by representation through the Committee and that therefore this motion is not a question of bringing in a new party or adding a new complainant, but is merely to allow petitioner to take the benefit of the decree, already entered in his favor, as to certain additional shares of stock; 200 of which he omitted through oversight to deposit and which with 600 additional purchased before the affirmance in 1896 of the decree refusing to set aside the foreclosure action, he believed had become worthless because of such decision. His petition shows his ignorance of all subsequent proceedings.

A very valuable discussion of the effect of the decree in class suits will be found in *Streets Federal Equity Practice*, Vol. 1, Ch. 12, Sec. 539, et seq. In Section 549 it is said:

“It has always been understood in the English Chancery, and apparently in the equity courts of this country, that the decree in class suits is binding on all persons in interest whether they are actually before the court or not; at least this is so where the interest of those persons is properly represented before the court. Those who are actually before the court as plaintiffs or de-

fendants are considered and treated as being the proper legal representatives of those who are absent but who are in like interest. The true class suit in fact supplies an instance of virtual representation. When the court once gets jurisdiction over the subject-matter, it will proceed to clean up every element of the controversy, as it affects each and every party in interest; and to this end all that is necessary is that the different persons in interest shall be before the court either in person or by representation. It is obvious that the court, before proceeding against parties who are such by representation only, will take care to see that all are properly and fairly represented. This has always been fully insisted on. Granting that the idea of proceeding against, or on behalf of, parties who are such by representation only is a valid one,—and that it is based on a sound principle of jurisprudence is obvious from the fact that in many cases justice could not otherwise be administered,—it follows that *a decree entered in a class suit must of necessity be valid and binding as to all. Those who are represented are concluded in the same degree and to the same extent as are those who are actually before the Court.* This is a rational and just conclusion, and it has the sanction of the established usage of the English chancery. *The jurisdiction of the court over the subject-matter enables the court to determine the rights of all persons to the property, provided only they are sufficiently represented before the court."*

One of the earliest cases (*Handford v. Storie*) is to be found in 2 Simon's and Stuart's Reports (in Chancery) 196, decided in 1825. In this case one holder of a debenture had filed a bill in behalf of himself and all other debenture holders against the maker thereof, praying for an account and

payment. After the institution of his suit and while it was pending he sold his own debenture to the maker upon advantageous terms and thereupon consented that the bill be dismissed before any decree was made upon it, and the bill was accordingly dismissed. Subsequently another debenture holder, on behalf of himself and other debenture holders, filed a bill against the complainant in the former action, praying that such complainant re-pay to the Trustees the money he had received in order that it might be distributed under the trust deed. The Court held that where a plaintiff files a bill on behalf of himself and all other persons of the same class he retains the absolute dominion of the suit until the decree and may dismiss the bill at his pleasure; but after a decree he cannot deprive the other persons of the same class of the benefits of the decree; the Vice Chancellor saying in conclusion:

“The reason for the distinction is, that before Decree no other person of the class is bound to rely upon the diligence of him who has first instituted his Suit, but may file a Bill of his own; and that, *after a Decree, no second Suit is permitted.*”

In *Brinkerhoff v. Bostwick*, 99 N. Y. 185, the Court also held that in a representative or class action a judgment when taken was for the benefit of all the stockholders and the rights of the other stockholders or parties to the action by representation at once attach to the judgment. The Court said:

“In this case, therefore, it was not necessary that the other plaintiffs be joined as nominal plaintiffs. The suit could have gone to judgment without their presence as nom-

inal plaintiffs and the judgment would have been just as effectual and just as beneficial for them as if they had been actually named as parties plaintiffs."

POINT II.

This court has power to modify the decree by directing that after affirmation upon the merits of the plaintiff's cause of action, that the matter shall be referred by the district court to a master to permit other stockholders similarly situated with the plaintiff who may be willing to come in and contribute to the expenses to prove their claims and directing for this purpose that reasonable notice of such hearing be given.

The following cases fully support this statement:

In *Trustees of Wabash & Erie Canal Co. v. Beers*, 2 Black, 450, one of the holders of a series of \$200,000. of bonds on a certain portion of the Erie Canal brought an action to establish the priority of his bonds over other liens subsequently authorized by legislative enactment. This court held that the entire issue of \$200,000 was a first lien and of its own volition remanded the case with directions to refer it to a master to ascertain who the other bondholders were and to notify them to come in and share in the fruits of the decree on paying their proportion of its expense. At p. 457, the court said:

"But plaintiff has brought his suit in behalf of himself and other bondholders of the same class. The record affords strong reason to believe that the other one hundred and ninety-eight bonds of the same issue, are outstanding, with arrears of interest unpaid to the same extent as plaintiffs, yet the decree makes no provision for them. This we think is error.

"The bill in this case must be treated as in the nature of a creditor's bill, although not strictly of that class. The decree should declare the equality of lien of all these bondholders with plaintiff, and should provide for them the same relief which it gives to him. And the case should be referred to a master to ascertain who these bondholders are, about which we presume there will be little difficulty, and to notify them to come in and share in the fruits of the decree, in paying their proportion of its expense.

"For this purpose the case is remanded to the Circuit Court, with instructions to proceed in accordance with this opinion."

In *Johnson v. Waters*, 111 U. S. 640, the decree in a class case had been entered without giving any opportunity to persons similarly situated to intervene in the action and this Court modified the decree of the Court below and provided that the case should be referred to a Master who should give three months' public notice by advertisement to all creditors to appear before him and to establish their debts. At page 673 it is said:—

"We think that the latter part of the decree ought to be modified. The bill was filed by William Gay in behalf of himself and of all others, creditors of Oliver J. Morgan,

** * * who shall come in and seek relief*

by and contribute to the expense of this suit.' In other words, it is a creditor's bill filed on behalf of the complainant and of all other creditors that choose to come in and share the expenses, for the purpose of securing the due administration and application of a trust fund, namely, the estate belonging to the succession of Oliver J. Morgan, deceased. On such a bill it is the usual and correct course to open a reference in the master's office and to give other creditors, having valid claims against the fund, an opportunity to come in and have the benefit of the decree."

In *Continental Trust Co. et al. v. Toledo, St. L. & K. C. R. Co.*, 82 Federal, at page 646, it is said by Taft, J.:

"The motion for an order requiring the Master in the creditor's suit to advertise the hearing of claims against the railroad company, and fixing the time of their presentation in his office, and the time for objections to the same, in accordance with the usual practice in a proceeding by general creditors' bill, is granted. The order ought to have been made at a much earlier time in the proceedings, but it is not too late now. Such a course is expressly approved by the Supreme Court of the United States in Trustees v. Beers, 2 Black, 457; In re Howard, 9 Wall. 175; Johnson v. Waters, 111 U. S. 674, 4 Sup. Ct. 619; Coal Co. v. McCreery, 141 U. S. 476, 12 Sup. Ct. 28. The proper course to be taken is described in 2 Daniell, Ch. Prac. (Eng. Ed. 1837-40) 854."

Also see *Matter of Howard*, 9 Wallace 175.

Martin v. Rainwater, 56 Fed. 7, 10-11.

POINT III.

IT IS RESPECTFULLY SUBMITTED that the petitioner, by an order of this Court, should be given an opportunity to prove before a Master his ownership of said additional eight hundred shares of stock and thereupon that the judgment should be amended so as to give him the same relief as to said eight hundred shares of stock as is given by the judgment herein to the petitioner and other owners of stock of said Houston & Texas Central Railway Co. or that petitioner be given permission to apply to the District Court for the Eastern District of New York for leave to prove the ownership of said eight hundred shares of stock and for the amendment of the judgment herein so as to give him the same relief as to said eight hundred shares of stock as is given by the judgment herein to the petitioner and other owners of stock of said Houston & Texas Central Railway Company or in the alternative that if the aforesaid relief is refused that this Court, in case it sustains the right of the plaintiff to the relief asked for, shall modify the decree of the Court below by directing that the action shall be referred to a master and that three months' public advertisement or such other suitable notice as to this Honorable Court shall seem proper, be given to all stockholders similarly situated with plaintiff, to appear before said Master, and that the District Court be directed to enter judgment for such stockholders as shall prove their claims or shall prove the ownership of additional stock of the Houston & Texas Central Railway Company to that which they may have already proven in the case at bar, in the same manner as judgment has

been heretofore entered in favor of the plaintiffs herein upon such intervening stockholders contributing their share of the expenses of this petition.

Respectfully submitted,

SCOTT, GERARD & BOWERS,
Solicitors for Petitioner,
Francis P. O'Reilly.

FRANCIS M. SCOTT,
JAMES W. GERARD and
SPOTSWOOD D. BOWERS,
Of Counsel.





Supreme Court of the United States.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

AGAINST

HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company similarly situated who may come in and contribute to the expenses of this action, HENRY FITCH and RUSSELL H. LANDALE, as Survivors of Committee of stockholders, SARA ROSENFELD and ROSETTA COHN, as Executrices under the Last Will and Testament of Charles Minzenheimer and Michael Gernsheim,
Plaintiffs-Respondents.

No.  305
O. 
Term,
1917.

IN THE MATTER OF THE APPLICATIONS
OF

CORN EXCHANGE BANK, FRANCIS P. O'REILLY and HENRY J. CHASE, to be made parties to this action in this Court and for leave to come in and contribute to the expenses of this action, and for the amendment of the judgment herein, or for leave to apply to the District Court for the amendment of the judgment, or in the alternative, for a modification of the judgment in case the plaintiffs' cause of action is affirmed,
Intervenors.

BRIEF IN OPPOSITION TO PETITIONS FOR INTERVENTION.

Petitions have been filed in behalf of Corn Exchange Bank, Francis P. O'Reilly and Henry J.

Chase, each claiming to be the owner of certain shares of stock of the Houston & Texas Central Railway Company. These petitions are filed upwards of twenty-five years after the right of each petitioner has accrued; more than twenty-five years after the judgment of foreclosure and sale of the property of the Corporation, the stock of which each owns, was entered; more than two years after the interlocutory decree was entered in the suit at bar; and more than eighteen months after the final decree was entered.

The petition filed in behalf of the Corn Exchange Bank clearly shows that since the year 1899, it has been the owner of 100 shares of the capital stock of the Houston & Texas Central Railway Company, having acquired such shares as part of the assets of the Queens County Bank, upon consolidation with that Institution; that the Queens County Bank acquired the stock on May 1, 1888, in part satisfaction of a judgment upon a note discounted with said Bank and as collateral security for the payment of which said 100 shares of stock had been deposited.

The petition of Henry J. Chase shows that he has been the owner of his stock since December 16, 1891, and therefore purchased the same after the Plan of Reorganization was announced and became effective.

The petition of Francis P. O'Reilly, which is made in his behalf and verified by Henry Fitch, who was one of the survivors of the Creditors' Committee, shows that he has been a stockholder since 1883, and that on January 31, 1890, he deposited 1,200 shares of stock owned by him with the Stockholders' Committee, and that in the months of

May, June and September, 1900, he purchased 600 additional shares. He asks to be allowed to intervene for the 600 shares so purchased and the 200 shares bought by him in 1883, which he now states he supposed he had deposited with the Committee.

It is uncontradicted that no step was taken to protect the petitioners' interests, if any, in the stock, or did any of the petitioners deposit his stock with the Committee. It is further uncontradicted that none of the suits instituted in behalf of the Committee was instituted for the benefit of any one of said petitioners.

The only reason given why each petitioner should not institute a new action, is placed upon the ground that the time of the Court will be consumed and that the petitioner will be put to a large and unnecessary expense.

The answer filed to each of the intervening petitions denies specifically all of the material allegations of each petition, and sets forth the suits instituted by and the steps taken in behalf of the Committee. In addition the answer denies that the petitioner is a stockholder similarly situated with the plaintiffs in the case at bar; that it would be unfair and inequitable to permit each petitioner to intervene for the reason that the defendant would thus be deprived of good and valid defenses which have been held unavailing against the plaintiffs in the case at bar, but which by reason of the different position of each petitioner, and because of silence and inaction would prevail and be complete defenses in their respective claims for relief. The answer to each petition also affirmatively sets out that the Court has no fund in its possession or under its control, and that the shares of stock obtained by the defendant under the Plan of Re-

organization, were never taken possession of by the Court, and points out that both the interlocutory and final decrees entered make provision for stockholders of the Old Company similarly situated.

POINT FIRST.

Each of the petitioners is barred by laches from now attempting to obtain benefits similar to those of the stockholders in whose behalf various litigations have been had and vigorous steps taken to protect and enforce their rights.

Conceding that each petitioner can be credited with the time during which the present action has been pending, it affirmatively appears on the face of each petition that no steps were taken by the Corn Exchange Bank or its predecessor in title, from May 1, 1888 to 1913, by O'Reilly from 1890 to 1913, and by Chase from December 16, 1891 to 1913.

The inactivity on the part of each petitioner and his gross laches in prosecuting his rights, would be sufficient to bar a bill in equity to obtain relief.

Taylor v. Holmes, 127 U. S. 489;

Riker v. Alsop, 155 U. S. 448;

Speidel v. Henrici, 120 U. S. 377;

Felix v. Patrick, 145 U. S. 317.

In *Taylor v. Holmes* (*supra*), a stockholder

brought an action in 1892 to correct a deed made to his corporation in 1853. This Court held that his laches were fatal, saying:

"This lapse of time requires some better account in regard to the reasons why this suit was not earlier instituted than is given in the present bill. It is obvious that during all this time, and, indeed, from the year 1861, when, as the bill declares, the defendants took possession of the property, it has been held by them adversely to the claim of the complainants. No sufficient reason is given why relief was not sought earlier."

The position of each of the petitioners upon the question of laches is entirely different from the complainants, who, it has been decided, were not barred by laches. Judge Ward, writing for the Circuit Court of Appeals in the case at bar, overruled defendant's claim of laches on the express ground that the complainants had not slept on their rights. In his opinion he stated:

"They have been striving for many years to recover. No acquiescence, but exactly the contrary, a continuous and vigorous protest appeared" (244 Fed. Rep. 61).

None of the petitioners puts himself in this class, and none of them shows that he has striven in any way to assert or protect his rights or that he has in any way protested.

The reason given that the time of the Court will be consumed and that the petitioner will in each case be put to a large and unnecessary expense, is entirely insufficient, in view of the true situation and status of each petitioner, as shown by his petition. Certainly this Court will not hold that the time of a Court will be unnecessarily consumed

in permitting the defendant to assert and establish a valid defense to the plaintiffs' claim, based upon plaintiffs' inaction and laches, and this Court will not shut the door and prevent the establishment of such defense. Neither will this Court permit the petitioners to obtain an advantage not heretofore sought by them, solely because they will otherwise be put to a large and unnecessary expense in an effort to attempt the establishment of a stale claim.

POINT SECOND.

Unless there is a fund in court about to be distributed to which the petitioner is in part entitled, or a decree entered which might operate prejudicially to the petitioner's rights, an intervention has not been allowed after final decree unless filed at the same term.

Foster's Federal Practice, Section 259, provides as follows:

"A petition for intervention may be filed in any stage of the cause, even after a final decree, provided at least that it is filed at the same term."

In thus stating the rule, announcement was made of the decision of the Circuit Court of Appeals of the Ninth Circuit, in *New York Guaranty & Indemnity Co. v. Tacoma Ry. & Motor Co.*, 83 Fed. Rep. 365.

The proper time for the petitioners to have filed

their respective petitions was after the interlocutory decree and before the final decree.

McArdle v. Alcott, 62 App. Div. 127;

Atkins v. Trowbridge, 162 App. Div. 161.

It is established by the decisions of this Court that except in cases prescribed by statute, or possibly for the purpose of redressing fraud, a Court loses all power over an action when the term at which the final decree has been entered, has expired.

In *Bronson v. Schulten*, 104 U. S. 410, 415, the Supreme Court says:

"But it is a rule equally well established that after the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and, if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court. *Brooks v. Railroad Co.*, 102 U. S. 107, 26 L. Ed. 91; *Public Schools v. Walker*, 9 Wall. 603, 19 L. Ed. 650; *Brown v. Aspden*, 14 How. 25, 14 L. Ed. 311; *Cameron v. McRoberts*, 3 Wheat. 591, 4 L. Ed. 467; *Sibbald v. U. S.*, 12 Pet. 488, 9 L. Ed. 1167; *U. S. v. The Glamorgan*, 2 Curt. 236, Fed. Cas. No. 15, 214; *Bradford v. Patterson*, 1 A. J. Marsh, 464; *Ballard v. Davis*, 3 J. J. Marsh, 656.

* * *

In *Sibbald v. U. S.*, 12 Pet. 487, the Supreme Court says:

"No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes (*Cameron v. McRoberts*, 3 Wheat. 591, 4 L. Ed. 467; *Bank v. Wistar*, 3 Pet. 431, 7 L. Ed. 731); or to reinstate a cause dismissed by mistake (*The Palmyra*, 12 Wheat. 10, 6 L. Ed. 531); from which it follows that no change or modification can be made, which may substantially vary or affect it in any material thing."

The same principle is applied in

Phillips v. Negley, 117 U. S. 665;
City of Manning v. German Insurance Company, C. C. A., 8th Circuit, 107 Fed. 52.

The authorities cited by the petitioners in their briefs are all clearly distinguishable.

In *Evans & Howard Fire Brick Co. v. United States*, 236 U. S. at 199, this Court permitted the petitioners to intervene solely for the reason that they were entitled to be heard concerning the settlement of the decree in so far as it might operate prejudicially to their rights. In the case of *United States v. Northern Securities Co.*, 128 Fed. Rep. 808, application for leave to intervene was denied. The statement contained in the opinion of the Court which is quoted by these petitioners in their briefs, is in no sense at variance with the decisions of this Court in *Leadville Coal Co. v. McCreery*, 141 U. S. 476, where the Court took possession

of certain property and made distribution thereof; or in the *Matter of Howard*, 9 Wallace, 175, where there was a fund in Court about to be distributed.

If the rule be as announced by the Circuit Court of Appeals in *United States v. Northern Securities Company* (*supra*), that petitions for intervention are never granted as a matter of course, and that they ought not be granted "unless it is necessary to do so to preserve some right which cannot otherwise be protected, or to avoid some complication that is liable to arise", none of the petitioners has brought himself within this rule. Each still has the right to bring an independent action. The decree entered, in no way prejudicially affects his rights and in no way attempts to distribute property in the hands of the Court upon the distribution of which all rights therein would be effectively cut off.

The additional quotation from the opinion in that case is clearly applicable to the suit at bar.

"It was further contended in argument that the stock of the Northern Pacific and Great Northern Railway Companies now standing in the name of the Securities Company was placed in *custodia legis* by the filing of the government bill in this case; that it has never been released from such custody, although a final decree has been entered; and that on this ground the petitioners who assert a right to have particular shares of the Northern Pacific Railway Company returned to them are entitled to intervene. This argument does not impress us favorably. It may be conceded that, so long as property remains actually in judicial custody, any one asserting a right thereto or interest therein may intervene, although the case in virtue of which judicial custody was acquired has passed to a final decree. *In re Howard*, 9 Wall. 175, 184, 19 L. Ed. 634, and cases cited; *Williams v. Mor-*

gan, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559. It is a well settled doctrine that when a court has acquired the custody of property persons who assert an interest therein have a right to apply to the court for relief, and, as a general rule, cannot obtain relief elsewhere. This court, however, has never assumed the custody of the stock of the Northern Pacific and Great Northern Companies, but has studiously refrained from so doing. It did not assume to direct what should be done with the stock in question when it enjoined the Securities Company from voting it, and the railway companies from paying dividends thereon to the Securities Company. Nor was the bill which was filed by the government one that placed the stock in judicial custody when it was filed. It was proceeding strictly in personam, which prayed the court to enjoin the use of the stock for the accomplishment of certain unlawful objects, and the relief granted was confined to that end. The intervention cannot be allowed on the ground last stated."

Both the interlocutory decree and the final decree in the suit at bar made provision for stockholders other than the complainants, who might come in and contribute to the expenses of the action. No decree was entered exclusively for the benefit of the complainants, but the interlocutory and final decree as entered, made ample provision for any stockholder who might avail himself of its provisions in due time, and in conformity with the Court rules and Court decisions.

The interlocutory decree and the final decree having contained appropriate provisions for the benefit of all stockholders similarly situated, the cases at bar is in no way analagous to *Johnson v. Waters*, 111 U. S. 640; or *Continental Trust Co., et al., v. Toledo, St. L. & K. C. R. Co.*, 82 Fed. Rep. at 642.

POINT THIRD.

Each of the petitions for leave to intervene should be denied.

This Court is asked to permit stockholders who have slept for more than twenty-five years without attempting to enforce their rights by any step whatever, to avail themselves of the provisions of the decree obtained on behalf of other stockholders who vigorously and continuously were attempting to enforce their rights. That the petitioners are in a class entirely distinct from the complainants is self-evident.

To afford these petitioners at this time a further and second opportunity to avail themselves of the provisions of the interlocutory and final decree and come in and attempt to prove their rights upon which they have slept for a quarter of a century, and in addition to thus deprive the defendant of valid defenses, is to permit a course so inequitable that its mere statement should move this Court to a denial thereof.

Respectfully submitted,

ARTHUR H. VAN BRUNT,
LEWIS H. FREEDMAN,

Attorneys and Counsel for Defendants.

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54 Wall Street,
Borough of Manhattan,
City of New York.

SUPREME COURT OF THE UNITED STATES.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

AGAINST

HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action; HENRY FITCH and RUSSELL H. LANDALE, as Supervisors of Committee of Stockholders; SARA ROSENFELD and ROSETTA COHN, as Executrices under the Last Will and Testament of Charles Minzensheimer and Michael Gernsheim,
Plaintiffs-Respondent.

No. 773.
October Term, 1917.

IN THE MATTER

OF

The Application of FRANCIS P. O'REILLY, for the Amendment of the judgment herein or for leave to apply to the District Court for the amendment of the judgment

or in the alternative for modification of the judgment in case the plaintiff's cause of action is affirmed.

Southern Pacific Company, defendant in the above-entitled action, for answer generally to the petition of Francis P. O'Reilly, alleges as follows :

I. It denies that the petitioner is a stockholder of the Houston and Texas Central Railway Company, similarly situated to the plaintiffs in the action at bar.

In support of such denial it alleges that it affirmatively appears in the petition that the petitioner is the owner of 2,000 shares of the stock of the Houston and Texas Central Railway Company; that in 1890 he deposited 1,200 of such shares of stock with the Committee of Stockholders of said company, of whom the plaintiffs herein, Henry Fitch and Russell H. Landale, are the surviving members, and as to the shares so deposited by the decree made herein he has been granted full relief; that he failed to deposit with such committee 200 shares which were apparently owned by him at that time, and that he has taken no action whatsoever to protect his interest therein until the filing of this petition, long after the accrual of any right of action to stockholders; that the remaining 600 shares were purchased by him at a time when he conceived the Stockholders' Committee had gained some advantage in the litigations pursued by it, but further proceedings in the said action resulting adversely he took no action whatsoever to protect his rights in said stock, nor did he make any deposit with said Stockholders' Committee of said 600 shares and has remained absolutely inactive since such time.

The record in the case at bar shows that since 1889, one year after the entry of the foreclosure decree, and up to the

present time, the Stockholders' Protective Committee, of which plaintiffs were members, were actively engaged in the prosecution of various litigations seeking to recover on behalf of themselves, and others similarly situated, for the alleged wrong which they fancied they had sustained.

In the answer to the petition of the Corn Exchange Bank for similar relief, filed herewith, by the same attorneys, which petition more fully discloses the situation, the details of such litigations and many other pertinent matters are disclosed, and for brevity this defendant refers to its answer to the petition of the Corn Exchange Bank and prays this Court to consider it as a part hereof.

The record further shows that during the progress of these various litigations three separate reports were sent out by such Stockholders' Committee to their depositors, detailing their activities and the results achieved. As this petitioner was a depositor with that committee to the extent of one thousand two hundred shares it must be assumed that he received these reports and was fully advised as to the progress of such litigations, and any lack of information regarding his rights and the activities of such committee was due solely to his inaction or acquiescence. Copies of the three reports sent by such Stockholders' Committee appear in the record in the case at bar at pages 192 to 202.

II. In discussing the affirmative defenses the Court, in the case at bar, overruled the defense of laches upon the ground that the activities of the Stockholders' Committee in the suits referred to above were sufficient to show that those claiming through such committee had been at all times active in endeavoring to protect their rights though their proceedings had been brought upon a different theory than that which the Court concluded was involved in the case at bar.

It is significant that petitioner does not allege ignorance or lack of knowledge of the provisions of the Reorganization

Agreement or does he state that the terms thereof did not come to his attention so that the ground stated by the Circuit Court of Appeals for overruling the defense of laches in the suit at bar, to wit, that the plaintiffs had been actively pursuing a remedy, though upon an improper theory, does not apply to the stock on account of which the petitioner now seeks relief. Furthermore in 1889 he signed the protest of stockholders against the amount determined by the Central Trust Company of New York as the *pro rata* share to be paid by stockholders to entitle them to stock in the reorganized company (Exhibit C, fols. 817-826). In fact, it affirmatively appears that in respect to this stock he has taken no steps whatsoever to enforce what Judge HOUGH designates "an always existing cause of action based on facts of almost public notoriety." It therefore follows that his silence, inaction and acquiescence do constitute such laches as to bar him from any remedy or recovery or participation in the recovery had by plaintiffs in the accident at bar in respect to stock not deposited with the Stockholders' Committee.

III. In the Circuit Court of Appeals Judge HOUGH, after discussing whether or not the plaintiffs had a remedy at law, and if so, whether the Statute of Limitations would be an available defense to the alleged cause of action, states as follows (244 Fed. Rep., 61, (66)) :

"It follows that the present decision holds in substance that there is no remedy at law for these plaintiffs; that equity is the only jurisdiction for them, and that twenty-five years of failure to discover an always existing cause of action, based on the facts of almost public notoriety, does not constitute laches, in the absence of silence, inaction, or acquiescence by plaintiffs; or loss of advantages or change of situation caused or contributed to by plaintiffs on defendant's part."

It is apparent, therefore, that as petitioner was not active in protecting his rights, that it might well be that the court

would hold that his failure to act constituted such silence, inaction and acquiescence as to bar any remedy of recovery. Defendant is entitled to its day in Court in regard to such defense.

IV. Defendant deems it proper to make specific answer to the allegations contained in the petition, though many of them have been already replied to in its answer to the petition of the Corn Exchange Bank, in order that the record herein may be full and complete, and for answer thereto it alleges as follows :

FIRST. It alleges that the allegations contained in Article " First " of the petition do not fully or correctly set forth the nature of the action, the relief stated, the proceedings had or the provisions of the interlocutory judgment attempted to be recited therein and begs leave to refer to the record in the case at bar for a full and correct statement of each and every of said particulars.

SECOND. It alleges that it is immaterial whether petitioner had or had not knowledge of said judgment until after the decision of the Court of Appeals in the summer of 1917 and alleges that proper activity or inquiry on the part of the petitioner of the members of the Stockholders' Committee with which he already had on deposit one thousand two hundred shares would have fully disclosed to him the exact situation and enabled him to take such steps as might be desirable and proper to protect his interests. It denies that the shares of stock of the Houston & Texas Central Railroad Company by said judgment decreed to be held in trust are of a value in excess of \$350 per share. Except as above alleged, explained or denied it has no knowledge of the allegations contained in article " Second " of the petition.

THIRD. The defendant alleges that the applications of the executrices of Charles Minzensheimer and of Michael Gernsheim were duly made to the United States District Court for the Eastern District of New York at a time when such court had

jurisdiction of the action at bar and of the parties thereto, to wit, prior to the entry of final decree and that by direction of the court proof was duly taken as to the allegations contained in said petitions, the status of the petitioners, and the defenses in defendant's answer thereto, and said proofs were considered by the court and judicially passed upon prior to the making and entry of the order admitting said petitioners as parties defendant. Said order constituted a judicial determination of the status of petitioners at a time when the court had jurisdiction of the action.

FOURTH. The defendant admits that an appeal was taken from said final decree to the Circuit Court of Appeals and said decree was affirmed, Judge HOUGH dissenting in part from said affirmance, and that this Honorable Court granted a writ of *certiorari* on or about November 23, 1917, and that said action is now pending for hearing before this Court. It admits that application was made after affirmance by the Circuit Court of Appeals to the District Court by a stockholder for leave to intervene as a party plaintiff and that such application was denied by the District Court. Except as above admitted or alleged, it has no knowledge of the allegations contained in article "Fourth" of the petition.

FIFTH. The record in the case at bar on page 188 discloses a deposit with said Stockholders' Committee by Francis P. O'Reilly of two hundred shares and by Francis P. O'Reilly, Trustee, of one thousand shares. Except as informed by such record, this defendant has no knowledge of the allegations contained in article "Fifth" of the petition.

SIXTH. Defendant admits and alleges litigation was begun by Stephen W. Carey and others for the purpose of setting aside on the ground of fraud the foreclosure decree theretofore entered and on or about December, ¹⁸⁸⁹~~1892~~, a certain temporary injunction order was entered which upon the return thereof the court refused to make permanent; that thereafter the case was tried, decided against the plaintiffs, and upon appeal to this Court,

said decision was affirmed. Except as above admitted or alleged, the defendant has no knowledge of the allegations contained in article "Sixth" of the petition.

SEVENTH. Defendant has no knowledge of the allegations contained in article "Seventh" of the petition but points out that it affirmatively appears from such allegations that petitioner, though having at all times "an always existing cause of action" and the record showing notices to him of the activities of the Stockholders' Committee slept upon such rights and took absolutely no action in respect thereto or made no inquiry in regard to the entire matter until just prior to the filing of the petition in the case at bar—nearly thirty years after the accrual of his said alleged cause of action.

EIGHTH. Defendant has no knowledge of the allegations contained in article "Eighth" of the petition, but points out that petitioner, being a depositor as to one thousand two hundred shares of stock with the Stockholders' Committee, was in a position at all times to obtain information in respect to the activities of that committee and the status of the litigation, and that his failure to cause due inquiries to be made and to take proper steps to protect his rights, if any such he had, constitutes such laches as to bar him from any relief.

NINTH. Defendant is advised that the allegations contained in article "Ninth" of the petition, except that as to no previous application having been made, are conclusions of law, and that it is not called upon to answer to the same.

V. Defendant alleges that the petitioner is not similarly situated to the plaintiffs, and that justice and equity requires petitioner should be compelled to duly prove his cause of action, and that it would be unfair and inequitable to permit him to intervene in the case at bar or to open the decree therein for his benefit if the same be affirmed by this court, because such action would deprive the defendant of good and valid defenses to said alleged cause of action, which defenses were held not open to it as against the

plaintiffs by reason of the difference in the situation of the plaintiffs and the petitioner.

VI. The case at bar is not one in which a fund is in the possession or under the control of the court, and is not one in which the decree entered sought to distribute such fund to the exclusion of persons equitably entitled to share therein. The shares of stock which the defendant obtained under the Plan of Reorganization were never taken possession of by the court. Both the interlocutory and final decrees entered in the case at bar made provision for stockholders of the Old Company similarly situated.

WHEREFORE, the defendant, Southern Pacific Company, prays that the petition be denied in all respects and that the petitioner be not allowed to intervene herein or be granted any of the other relief prayed for.

SOUTHERN PACIFIC COMPANY,

by

HUGH NEILL,

Secretary,

Defendant-Appellant.

ARTHUR H. VAN BRUNT,

LEWIS H. FREEDMAN,

Counsel for Defendant-Appellant,

No. 54 Wall Street,

New York City, N. Y.

STATE OF NEW YORK, }
 County of New York, } ss. :

HUGH NEILL, being duly sworn, deposes and says that he is the Secretary of Southern Pacific Company, the defendant-appellant in the above-entitled cause; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

HUGH NEILL.

Sworn to before me this 31st }
 day of May, 1918. }

THOMAS F. DOUGHERTY,
 (Notarial Seal.) Notary Public No. 104,
 New York County.

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 DUDLEY F. PHELPS, Esq.,
 32 Broadway, New York City, N. Y.,
 Attorneys for Plaintiffs-Respondents.

Supreme Court of the United States.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellant,

against

HENRY L. BOGERT, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors under the Last Will and Testament of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action; HENRY FITCH and RUSSELL H. LANDALE, as Survivors of Committee of Stockholders; SARA ROSENFELD and ROSETTA COHN, as Executrices under the Last Will and Testament of Charles Minzesheimer and Michael Gernsheim,
Plaintiffs-Respondents,

No. 305
Oct. Term
1918.

In the Matter

of

The Applications of THE CORN EXCHANGE BANK, FRANCIS P. O'REILLY, and HENRY J. CHASE, and others for leave to come in and contribute to the expenses of this action for the amendment of the judgment herein, or for leave to apply to the District Court for the amendment of the judgment, or in the alternative for modification of the judgment in case the plaintiffs' cause of action is affirmed.

Plaintiffs - Respondents' Memorandum in Answer to Petitions for Leave to Intervene.

The plaintiffs have no objection to other stockholders similarly situated being admitted as parties to this suit upon reasonable terms.

In November, 1889, the minority stockholders agreed with their Committee (p. 187 main record) to deposit their stock and pay fifty cents for each share deposited. The following year, 1890, they agreed to give the Committee 25% of this stock (p. 191 of main record) for the purpose of carrying on their fight against the Southern Pacific Company. Thereafter, various small cash assessments were levied against the stockholders (pp. 192-202). These assessments were not always paid by all the depositors, but all of the stockholders represented by the Committee paid at least one dollar per share, and some of them paid as much as \$1.50.

Several parties intervened while this suit was in the District Court, before final judgment. The court, after a hearing and due deliberation upon briefs submitted by all parties, allowed the petitioners to become parties upon payment to the plaintiffs' attorneys of one dollar for each share of their Houston & Texas Central Railway stock, and 25% of the said stock (pp. 377 and 387 of the record).

All parties felt this to be fair and reasonable and we now ask this Court, in the event new parties are admitted to the benefit of this judgment, that it be upon the same condition, i. e., that they pay the attorneys for the plaintiffs one dollar for each share of their Houston & Texas Central Railway stock, and 25% of the said stock.

The court has power to impose these terms.

Central Railway, etc., Co. v. Pettus, 113
U. S. 116.

It is respectfully submitted that the orderly procedure would be to grant the relief asked for in Point II, page 12 of Messrs. Scott, Gerard & Bowers' brief filed on the petition of Fergus Reid;

suspending decision on these petitions until this Court determines the main suit, and if this Court should affirm the decree that then by its mandate it direct that these petitioners may come in within a specified time and prove their right to relief before a master in the District Court on the same terms as imposed on the other intervening stockholders already made parties by the District Court.

Respectfully submitted,

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H. SNOWDEN MARSHALL,
A. J. DITTENHOEFER,
DAVID GERBER,
DUDLEY F. PHELPS,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1918.

SOUTHERN PACIFIC COMPANY,
Petitioner,

v.

HENRY L. BOGERT *et al.*, as Executors,
&c., *et al.*,
Respondents.

No. 305.

REPLY BRIEF FOR SOUTHERN PACIFIC COMPANY.

The parties will be referred to by their titles in the trial court.

The plaintiffs commence their argument with the statement that the facts found by the lower courts "will be accepted by this Court" (Plaintiffs' Brief, 6). In the main, the dispute between the parties is as to the inferences to be drawn from the facts rather than as to the evidentiary facts themselves. The plaintiffs' position is that this Court must accept as conclusive all of the facts found by the lower courts, as well as the inferences drawn from them. The rule is, not that the findings of the lower courts are conclusive, but that they "will

not be disturbed unless it is clear that" the court's "conclusion was erroneous" (*Baker v. Scofield*, 243 U. S. 114). This brief is filed for the purpose of correcting some of the more important misstatements of fact in the plaintiffs' brief.

1. The plaintiffs assert that the defendant owned only fifty-one per cent. of the stock of the Morgan's Company (Plaintiffs' Brief, 62 and 65). They cite no reference to the record in support of this assertion. We have been able to find none. It is certainly not the fact. Mr. Tweed, the General Counsel and Chairman of the Board of Directors of the defendant, testified in the MacArdell Case that the defendant "owned a very large majority of the capital stock of" the Morgan's Company (MacArdell Rec., f. 927). True, there are some general statements in the record to the effect that the defendant owned a majority of the Morgan's Company stock, these statements being made not with reference to the exact amount owned, but having reference to the question whether or not the defendant controlled the Morgan's Company. The 29th Annual Report of defendant to its stockholders, Complainants' Exhibit 11 (p. 46 thereof) shows that the defendant owns all of the stock of the Morgan's Company (see also R., 971).

2. The plaintiffs state that the defendant in its main brief has made no allowance for the \$880,000 of bonds held by the Morgan's Company as collateral (Plaintiffs' Brief, 64). There is no proof in the record that the Morgan's Company held any such amount of collateral. The evidence shows that \$880,000, face value, of the Railway Company's General Mortgage Bonds were held by the Southern Development Company and by the Morgan's Com-

pany. The evidence does not show in what proportion this collateral was to be allotted between these two companies. An exact statement in detail of the floating debt of the old Railway Company, including all collateral held by its creditors, will be found in the report made by the officers of the Central Trust Company upon which the so-called assessment of \$71.40 a share was based. This shows that there was due by the Railway Company to the Morgan's Company and to the Southern Development Company \$2,536,976.53; applies at par as a credit on this indebtedness \$880,000 of Four Per Cent. General Mortgage Bonds (although they were worth nowhere near that sum and such value as they had resulted chiefly from the defendant's own guaranty); and finds a balance of unsecured indebtedness due these two Companies of \$1,656,976.53 (see Exhibit E, *Gernsheim v. C. T. Co.*, Rec., 84-7). The market value of the old general mortgage bonds, for which these new bonds were received in exchange, was but 30 per cent. of their face value (*Gernsheim v. Olcott*, Rec., 216). It should be noted that the reduction of this indebtedness by crediting these bonds thereon at their full face value is one of the benefits that the defendant secured for the Railway Company by the reorganization which for so many years the plaintiffs have attacked. The plaintiffs repeatedly refer to the holding of collateral by the floating debt creditors, seeking to give the impression that these creditors were amply secured; but the net indebtedness due the Morgan's Company and the Southern Development Company over and above all collateral is shown by Exhibit E above mentioned to be \$1,656,976.53.

3. In this connection, the plaintiffs suggest that the floating debt creditors should be left to come into Court and assert their rights independently, but, of course, this suggestion was rather disingenuous, as the plaintiffs realize that it is too late for the floating debt to take any such independent action. The plaintiffs say in this connection that they should not be required to pay to the defendant any part of the floating debt controlled by it which it has given up, because "the defendant does not propose that it shall also be assessed to pay the balance of the floating debt due from the old Company to the Morgan's Company, but proposes to leave unpaid its *pro rata* share of that debt" (Plaintiffs' Brief, p. 62). The defendant's position is fully stated in its additional brief (p. 23 *et seq.*, see particularly p. 27).

The plaintiffs' brief asserts in italics (pp. 63, 65) that no evidence was offered to show that the defendant had suffered any loss by reason of the debt due by the Railway Company to the defendant's affiliated companies, but the evidence shows that the Railway Company did not pay this indebtedness, so that the defendant's loss follows as a matter of course.

The defendant did not acquire the new stock until the plaintiffs had refused to accept the fair terms that were offered them. Then it acquired all of the new stock, and it was immaterial whether it paid the floating debt which it controlled or not, but the plaintiffs, who base their demand for relief upon the alleged injustice that has been done them by the defendant, should not share in the benefits of the defendant's action without also bearing its burdens.

4. The plaintiffs seek to create the impression that the defendant through the Southern Development Company began the litigation against the Railway Company which subsequently resulted in the foreclosure of the latter's mortgages (Plaintiffs' Brief, pp. 9, 28). The first suits instituted were by the trustees of the Main Line and Western Division First Mortgages. These bills of complaint were filed February 11, 1885 (MacArdell Rec., 920, 970). The Southern Development Company's bill was not filed until February 16, 1885 (*Id.*, 1020). The bills of the mortgage trustees asked for the appointment of receivers of a portion of the Railway Company's property. In order to protect the rights of the Railway Company and its creditors, the Southern Development Company filed a bill upon which a receiver of the Railway Company's entire property was appointed.

5. The plaintiffs, in their brief (p. 15), state the amount of reorganization expenses (including bonus to bondholders, interest and floating debt) which they would have been required to pay in order to obtain a proportionate part of the new stock, as \$71 per share of *new stock*, in an effort to show that there was discrimination against them. The fact is that the amount of the so-called assessment ascertained by the Central Trust Company, as Trustee of the reorganization, was \$71.40 per share of *old stock*, and the amount was thus stated in the notice to the stockholders which the Central Trust Company published (Exhibit D, *Gernsheim v. C. T. Co.*, Rec., 82). Translated into dollars per share of new stock, the amount would have been \$55.16 (Exhibit E, *Gernsheim v. C. T. Co.*, Rec., 87).

6. The plaintiffs conclude their "statement of facts" with the assertion that in consummating the reorganization—

"What the Southern Pacific Company *gave* belonged to the Railway Company; what it *received*, it kept for itself" (Plaintiffs' Brief, 18).

What the defendant received was the stock of the new Company after these plaintiffs had declined to take any of it on the fair terms that were offered them. What the defendant gave was (1) expenditures in cash amounting to more than \$2,600,000, in payment of the expenses of the reorganization, including bonus to bondholders, interest, etc. (R., 233-4); (2) floating indebtedness of the Morgan's Company and Southern Development Company amounting to more than \$2,500,000, against which they held as collateral \$880,000 of Third Lien Four Per Cent. Bonds, the value of which resulted chiefly from the fact that the interest on them was guaranteed by the defendant itself; and (3) a guaranty of the interest on nearly \$20,000,000 of new securities, as well as the principal of more than \$1,000,000 of debentures. The conclusion of the plaintiffs' "statement of facts" is more rhetorical than accurate.

7. The plaintiffs seek to negative the proof that the reorganization plan was widely advertised in the public press, such advertisements beginning as early as January, 1888, by stating that these advertisements were addressed to bondholders and not to stockholders (Plaintiffs' Brief, 7). The plaintiff Gernsheim was a member of the banking firm of Kuhn, Loeb & Co. (R., 395); Bogert's testator, Lawrence, was a member of a stock exchange house

(R., 219) ; and the plaintiffs Fitch and Whittemore were stockbrokers (R., 155, 357-8). The business of such men as these was to keep informed of the financial advertisements appearing in the New York press. It was not possible for an advertisement that was given such wide publicity to have escaped their attention, no matter whether it was addressed to stockholders or to bondholders (see in this connection Defendant's Main Brief, 55).

8. The plaintiffs state that the Railway Company had executed seven mortgages, none of which contained any provision allowing foreclosure for non-payment of interest, &c. "and the principal of these mortgages was not due for many years after 1888" (Plaintiffs' Brief, 8). The Income and Indemnity Mortgage became due May 1, 1887 (Mac-Ardell Rec., 866). It covered all of the properties of the Railway Company and specifically provided for the sale thereof in case of default in the payment of interest (*Id.*, 597, 603).

9. Moreover, the plaintiffs assert that the Income and Indemnity Mortgage "was not really outstanding" because most of the bonds thereby secured were pledged under the General Mortgage (Plaintiffs' Brief, 36). The plaintiffs have, however, explicitly stipulated that at the time of the foreclosure the Income and Indemnity Mortgage was "outstanding" (R., 231).

10. The plaintiffs suggest that foreclosure might have been avoided by using the Railway Company's operating income to pay the interest in default (Plaintiffs' Brief, 13). They fail to state the fact that there was no operating income. The deficit from 1881 to 1888 was never less than \$400,000,

and averaged \$750,000, per annum (MacArdell Rec., 262; *Gernsheim v. Olcott* Rec., 211).

11. The plaintiffs now take the position that the foreclosure decree was well founded, but that the injustice done them by subsequently fixing the so-called assessment at the "prohibitive" sum of \$71.40 per share of new stock (this should be old stock) rendered the defendant liable to them (Plaintiffs' Brief, p. 15). *There is no evidence, however, that the Trustee of the reorganization failed correctly to ascertain this amount;* but in the *Gernsheim* litigation it was specifically held that the Trustee was an unbiased party, and that it had made a careful and thorough investigation and determined this amount after due action by its Executive Committee and Board of Directors (see note to Defendant's Additional Brief, 16). The foreclosure decree, the correctness of which is now admitted, necessarily involved approval of the terms of the reorganization agreement; for this agreement was filed in the consolidated foreclosure suit prior to the entry of the foreclosure decree and formed a part of the record on which that decree was based (MacArdell Rec., 892-919). This agreement showed the terms on which the defendant was permitted to acquire the new stock if the plaintiffs refused to accept the fair terms that were offered them; *and the plaintiffs admit that this agreement was carried out in accordance with its terms* (R., 15).

12. The plaintiffs assert that the Railway Company's land grants were worth approximately \$15,000,000, and cite in support of this statement an allegation in their complaint which was denied by the Railway Company's answer (Plaintiffs' Brief, p. 31). After the defect in title to these lands had

been cured by a remedial statute, their net proceeds of sale did not amount to anywhere near this sum, although the sales of these lands were upon long term credit and were made from time to time during a period of more than a quarter of a century (see Complainants' Exhibit 11, and Defendant's Additional Brief, 5, 6).

13. The plaintiffs seek to make it appear that the foreclosure decree was hastily entered by consent. As a matter of fact, the litigation was begun by the mortgage trustees nearly four years prior to the entry of said decree, and bills demanding foreclosure for principal were filed two years and a half prior thereto. But for the negotiations leading up to, and the anticipation of the consummation of, the reorganization, a foreclosure decree would have been entered earlier (see Defendant's Main Brief, 50-51).

14. On page 46 of their brief, the plaintiffs discover the defendant's sinister motive. The reorganization they allege was brought about by the defendant in order to incorporate the Houston & Texas Central Railway into its great transcontinental system. But without the reorganization the defendant already controlled it. The defendant's first connection with the Railway Company began in the year 1883, when the Southern Development Company began buying the stock of the Morgan's Company. A reference to the map annexed to the defendant's 29th Annual Report (Complainants' Exhibit 11) will show that the line of railroad owned by the Morgan's Company is a part of the defendant's main transcontinental line from Portland to New Orleans and thence by sea to New York, while the Houston & Texas Central Railway is not a part of the transcontinental line. It was because

of the Morgan's Company's ownership of this link in the transcontinental chain that the defendant acquired its stock. The fact that the Morgan's Company owned a control of the old Railway Company was a mere incident. A reference to this same Exhibit 11 will show that the lines of railroad then owned by the Railway Company aggregated 508 miles in length. When it is remembered that the Railway Company's indebtedness was \$26,000,000, *an indebtedness of more than \$50,000 per mile*, and that its physical properties were in bad condition (Carey Rec., 120; *Gernsheim v. C. T. Co.*, Rec., 160), it is plain that its ownership did not constitute an inviting proposition.

Respectfully submitted,

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